

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





76-2093

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- -x  
ALFRED LEWIS, :  
Petitioner/Appellee :  
-against- :  
ROBERT J. HENDERSON, :  
Respondent/Appellant. :  
----- -x

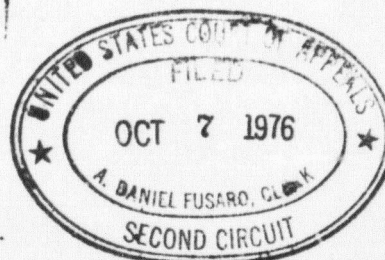
AN APPEAL FROM AN ORDER  
OF THE UNITED STATES  
DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF  
NEW YORK

---

BRIEF FOR PETITIONER/APPELLEE

---

LAWRENCE STERN  
Attorney for Petitioner/Appellee  
11 Monroe Place  
Brooklyn, N.Y. 11201  
875-4304





## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CASES AND AUTHORITIES	1
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	
A. The facts elicited at Trial and the Huntley Hearing	1
B. The facts elicited at the Habeas Hearing	10
ARGUMENT	
POINT I- CONFESSIONS OBTAINED FROM A MENTALLY UNSTABLE UNEDUCATED 22 YEAR OLD, DURING A 38 HOUR PERIOD OF IN-COMMUNICADO DETENTION, AN UNREASONABLE DELAY OF, AND DETOUR FROM ARRAIGNMENT FOR THE VERY PURPOSE OF EXTRACTING CONFESSION, DURING WHICH PERIOD WITHOUT SLEEP, FOOD OR RIGHTS ADVICE, HE WAS SUBJECTED TO CONTINUOUS 19 HOUR OVERNIGHT INTERROGATION BY SEVERAL POLICEMEN, PROMISES AND DECEPTIONS, NIGHTTIME FORAYS TO APARTMENTS AND PEEPHOLE SHOW-UPS, ARE INVOLUNTARY AS A MATTER OF LAW.	
A. <u>The Facts Established</u>	19
B. <u>Mental Coercion Established: Appellant's Failure to prove the contrary beyond a reasonable doubt</u>	39
C. <u>The Physical Coercion Question--New Evidence Requiring Redetermination</u>	41
D. <u>The Harmful Constitutional Error</u>	47
POINT II--PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW, A FAIR TRIAL AND THE PRIVILEGE AGAINST SELF-INCRIMINATION WHEN THE TRIAL JUDGE REFUSED TO CHARGE THE JURY ON THE FACTORS OF MENTAL COERCION WHICH WOULD RENDER A CONFESSION INVOLUNTARY	50
POINT III- THE POLICE UNNECESSARILY AND IMPERMISSABLY SUGGESTED THAT PETITIONER WAS THE BANK ROBBER BY SHOWING HIM UP ALONE AND IN CUSTODY AND DRESSED AS THE ROBBER TO A GROUP OF WITNESSES WHO WERE TOLD THEY WERE THERE TO IDENTIFY THE ROBBER AND WHO DISCUSSED THEIR IDENTIFICATIONS WITH EACH OTHER, AND SINCE THEY HAD ONLY FLEETING OPPORTUNITIES TO SEE THE ROBBER'S FACE DURING THE CRIME, THEIR IN COURT IDENTIFICATIONS WERE IRREVOCABLE TAINTED.	53
CONCLUSION	64



# TABLE OF CASES AND AUTHORITIES

## PAGE

<u>Berger v. New York</u> , 388 U.S. 41 (1967)	24
<u>Blackburn v. Alabama</u> , 361 U.S. 199 (1960)	30,33
<u>Bledsoe v. Nelson</u> , 432 F. 2d 923 (9th Cir., 1970)	50
<u>Braithwaite v. Manson</u> , 18 Cr. L. 2290 (2d Cir, 11/20/75)	54
<u>Brown v. Illinois</u> , 95 S. Ct. 2254 (1975)	22
<u>Clewis v. Texas</u> , 386 U.S. 707 (1967)	23,25
<u>Davis v. California</u> , 384 U.S. 737 (1966)	31
<u>Dyer v. McDougall</u> , 201 F. 2d 265 (2d Cir., 1952)	44
<u>Foster v. California</u> , 394 U.S. 440 (1969)	22,53
<u>Gilbert v. California</u> , 388 U.S. 263 (1967)	22,38
<u>Haley v. Ohio</u> , 332 U.S. 596	20,24
<u>Haynes v. Washington</u> , 373 U.S. 503 (1963)	26,27,44,51
<u>Hines v. LaVallee</u> , 531 F. 2d 1109 (2d Cir., 1975)	50
<u>Jackson v. Denno</u> , 370 U.S. 368 (1964)	7,44,48
<u>Lego v. Twomey</u> , 404 U.S. 477 (1972)	40
<u>Lewis v. Henderson</u> , 520 F. 2d 896 (2d Cir., 1975)	20,21,26,27 28,29,33,36 39,40,47,53
<u>Mancusi v. United States ex rel. Clayton</u> , 454 F. 2d 465 (2d Cir., 1975) cert. den. 406 U.S. 977	20,23,30
<u>Milton v. Wainwright</u> , 407 U.S. 371 (1972)	50
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	24,30,48
<u>Moore v. Follette</u> , 425 F. 2d 925 (2d Cir., 1970)	50
<u>Negron v. Henderson</u> , 496 F. 2db858 (2d Cir., 1974)	52
<u>Neil v. Biggers</u> , 409 U.S. 188	63
<u>Newell v. Shaffer Leasing</u> , 489 F. 2d 103 (5th Cir., 1974)	48
<u>Noce v. Kaufman</u> , 2 N.Y. 2d 347 (1959)	44
<u>O'Connor v. Ohio</u> , 385 U.S. 92	58



<u>People v. Alex</u> , 265 N.Y. 192 (1934)	25
<u>People v. Huntley</u> , 15 N.Y. 2d 72 (1965)	7,40,51
<u>People v. Townsend</u> , 33 N.Y. 2d 37 (1973)	25
<u>Philips v. Neil</u> , 452 F. 2d 337 (6th Cir., 1971)	50
<u>Rogers v. Richmond</u> , 365 U.S. 534 (1961)	39
<u>Simmons v. United States</u> , 390 U.S. 377 (1968)	38
<u>Sims v. Georgia</u> , 389 U.S. 404 (1967)	31,44
<u>Smith v. Estelle</u> , 519 F. 2d 1267 (5th Cir., 1975)	50
<u>Townsend v. Sain</u> , 372 U.S. 293	59
<u>United States v. Barrera</u> , 486 F. 2d 333 (2d Cir., 1973)	25
<u>United States v. Duvall</u> , 547 F. 2d 15 (2d Cir., 1976)	25,50
<u>United States v. Edmons</u> , 432 F. 2d 577 (2d Cir., 1970)	22,38
<u>United States v. Jensen</u> , 450 F. 2d 1258 (9th Cir., 1971) cert. den. 405 U.S. 1043	48
<u>United States v. Middleton</u> , 344 F. 2d 78 (2d Cir., 1965)	25
<u>United States v. Mims</u> , 481 F. 2d 636 (2d Cir.)	61
<u>United States v. Olivares-Vega</u> , 495 F. 2d 827 (2d Cir., 1974) cert. den. 95 S. Ct. 494	48
<u>United States v. Segal</u> , 500 F. 2d 1118 (10th Cir., 1974)	50
<u>United States v. Williams</u> , 524 F. 2d 407 (2d Cir., 1975)	50
<u>United States v. Yanishefsky</u> , 500 F. 2d 1326 (2d Cir)	61,62
<u>United States ex rel. Caminito v. Murphy</u> , 222 F. 2d 698 (2d Cir., 1955)	42
<u>United States ex rel. Cannon v. Smith</u> , Docket No. 75-2057 (2d Cir., 12/18/75)	44,54
<u>United States ex rel. Castro v. LaVallee</u> , 282 F. Supp. 718 (S.D.N.Y. 1968)	24,26,28,29,41
<u>United States ex rel. Cummins v. Zelker</u> , 455 F. 2d 714 (2d Cir.)	62



	Page
<u>United States ex rel. Delle Rose v. LaVallee</u> , 342 F. Supp 567 (S.D.N.Y. 1972) rev'd other gds. 410 U.S. 690 (1973)	28,31
<u>United States ex rel. Everett v. Murphy</u> , 329 F. 2d 68 (2d Cir., 1964) cert. den. 377 U.S. 967	38,42
<u>United States ex rel. Gonzales v. Zelker</u> , 477 F. 2d 797 (2d Cir.)	62,63
<u>United States ex rel. Pella v. Reid</u> , ___ F. 2d ___ (2d Cir., 12/11/75)	63
<u>United States ex rel. Phipps v. Follette</u> , 428 F. 2d 912 (2d Cir.)	61
<u>United States ex rel. Stovall v. Denno</u> , 388 U.S. 294 (1967)	22,38,58,59
<u>United States ex rel. Vanderhorst v. LaVallee</u> , 285 F. Suppl. 233 (S.D.N.Y. 1968)	42
<u>United States ex rel. Weinstein v. Fay</u> , 333 F. 2d 815 (2d Cir., 1964)	42
<u>United States ex rel. Williams v. Fay</u> , 323 F. 2d 65 (2d Cir., 1963)	42
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963)	22,38,39,48
New York Code of Criminal Procedure §165	22
Federal Rules of Appellate Procedure 35	48
Federal Rules of Civil Procedure 52(a)	20
28 U.S.C. § 2254(d)	40,45
Committee on the Federal Courts, Appeals to the Second Circuit (1975)	53



### PRELIMINARY STATEMENT

Respondent to the petition for a writ of habeas corpus in the District Court for the Southern District of New York (Frankel, J.), appeals to this Court from an order of the District Court entered July 16, 1976, granting the writ and ordering the petitioner's release from unconstitutional State custody unless he be retired before September 14, 1976. The District Court in a 26 page opinion ordered the writ to issue after a hearing held after this Court had rendered an extensive opinion and ordered a remand for that purpose. United States ex rel. Lewis v. Henderson, 520 F. 2d 896 (2d Cir., 1975). In a memorandum of September 1, 1976, the District Court stayed its order pending decision on respondent-appellant's expedited appeal to this Court.

### STATEMENT OF FACTS

Pursuant to Petitioner-appellee's (hereinafter referred to as petitioner) application for a writ of habeas corpus, the District Court (Frankel, J.) has vacated a judgment of conviction rendered against him in the former County Court of Bronx County of the State of New York (McCaffrey, J.) on November 25, 1958, convicting petitioner, after trial by jury, of the crimes of robbery, grand larceny, and assault and sentencing him to a term of imprisonment of 30 to 60 years.

#### A. The Facts Elicited at the Trial and the Huntley Hearing

At approximately 12:30 P.M. on February 6, 1958, the Manufacturer's



Hanover Trust Company at 155th Street and Third Avenue, Bronx, was robbed by a lone gunman. Upon entering the bank, the robber ordered the bank manager and a customer to collect the teller's loose cash in two shopping bags. The bags were then given back to the robber and he fled. The entire event lasted less than five minutes, with some \$12,000 being stolen. Petitioner was convicted after a jury trial of this robbery.

Eleven days after the robbery on February 17, 1958 at approximately 8:30 P.M., petitioner, then a 22 year old black man with a 9th grade education, was arrested by Detective Vincent Beckles in the lobby of an apartment house at 41 Convent Avenue, Manhattan (T. 320-322)\*. Beckles testified that the arrest was based solely on a complaint made earlier the same day by Mrs. Elizabeth Waller, a resident at the same address (T. 322), that on February 8th or 10th petitioner had left a briefcase containing a large sum of money at her apartment for safe-keeping (T. 275-278). He returned for the briefcase on February 16th and told her that some \$1,700 was missing and that he would return in a few days for the money (T. 283, 286, 293, 296). Although not arrested for the bank robbery, petitioner was immediately taken to the 30th Precinct in Manhattan and questioned about the missing briefcase and the money (T. 400) and he claimed initially that the money had been won at gambling.

Petitioner was held in custody at the 30th Precinct during the night of February 17-18 and upon his arrival there and throughout the night he was interrogated about the Bronx bank robbery and urged to disclose the location of the money which helped convict him (T. 354-260) and to confess to the robbery (T. 227, 299-401; HA 73a).

- - - - -

\* References to the trial transcript are designated "T" and references to the subsequent State hearing on voluntariness are designed "HA".



Petitioner testified (T. 400) he was physically beaten throughout this interrogation, and this testimony has never fairly been contradicted since Detective Beckles and Corbett, who were the only law enforcement people called to counter petitioner's charges of coercion, testified that they were not among those who interrogated the petitioner during this time (T. 337, 347; HA 73a) although the petitioner named Corbett as one of the major participants in the interrogation and beating (T. 401, 412). There has been no testimony that petitioner was not beaten during this interrogation by other officers.

At the trial, Beckles testified that he was investigating exclusively the Waller complaint and that he did not question petitioner about the bank robbery (T. 324). At the Huntley hearing, Beckles admitted that at the 30th Precinct, sometime after the arrest, he was "involved with the investigation of this robbery that the defendant, Alfred Lewis, was eventually convicted of." (HA 59). Beckles did not remain at the Precinct with petitioner and petitioner was left in the hands of other officers throughout the night, some of whom were engaged in the robbery interrogation (T. 337, HA 58-59, 69). At no time was petitioner ever booked on the Waller complaint for which he was ostensibly arrested (T. 324).\*

Throughout the night and the following morning, petitioner maintained his innocence. He did not sleep or eat (T. 401). He was moved to the 42nd Precinct in the Bronx at approximately 1 P.M. on February 18 (T. 322-324). There the interrogation was continued and he "agreed" to get the briefcase containing the money (T. 326). Petitioner

- - - - -  
\* It should be noted that at the trial, the court refused to consider the circumstances of the arrest, the absence of probable cause, or the events at the 30th Precinct, all of which it regarded as not connected to the robbery case (T. 335-337).



testified that he was physically beaten at this time (T. 405). He further testified uncontradictedly (T. 405) that his interrogators then told him that a criminal charge pending in another jurisdiction would be dropped if he produced the money used against him at the trial. Additionally, Detective Beckles testified (T. 325-326) that he in effect promised petitioner that if he disclosed the location of the money subsequently used to convict him, his position that the money belonged to him as the result of winning same at gambling would not be impugned, and that it was immediately after this exchange that petitioner agreed to lead the police to the money. Accompanied by police officers and a friend of petitioner, he was taken from the Precinct for a short time. Upon returning with the briefcase, petitioner confessed to the Bronx bank robbery at approximately 3:30 P.M. after receiving a promise of "help" from Detective Corbett (T. 381).

Detective Corbett testified at the trial and the Huntley hearing that he was in charge of the Bronx bank robbery case, and that he was called to the 30th Precinct in Manhattan on the night of the arrest on February 17, 1958, because they said they had the robbery suspect (T. 347, HA71). He remained at the 30th Precinct overnight, except for about an hour when he was not there (HA 73). Corbett testified that he did not question petitioner at the 30th Precinct (T. 347; HA 73a) but he did see petitioner go into a room with other officers; he did not know the nature of the questioning by those officers (HA 73a). He was told that a lineup had been conducted that night, and he saw and spoke to the witnesses in the precinct house (HA 72-73). Corbett testified at the trial that he didn't think petitioner slept on the night of the arrest (T. 382). At the Huntley hearing, he testified



that he saw petitioner taken into a police dormitory room\* but only for 20 minute intervals (HA 73a-74). Beckles said he saw the same thing but he said the intervals were 15, 30 or 45 minutes (HA 68). Neither detective saw petitioner sleep (HA 64,68). Neither detective saw him eat. Corbett saw food go into the room (T. 350, HA 73A,74).

Both Corbett and Beckles took petitioner from the 30th Precinct in Manhattan to the 42nd Precinct in the Bronx the new day at about 12:00 or 12:30 P.M. They all arrived there at about 1 P.M. and the interrogation proceeded immediately. Beckles testified that he told petitioner that petitioner was now in the custody of thw Bronx police and that all they wanted was the bank money and that all he need do is tell them where it was and that he could still maintain that the money was gambling proceeds (T. 325-326). Corbett testified that prior to this Beckles interrogation, he (Corbett) in the presence of three other detectives, had interrogated petitioner and had convinced him to lead them to the money by telling petitioner that it was to his benefit to have his gambling proceeds in safekeeping (T. 367). Corbett further testified that petitioner received no food or water after 1 P.M. at the 42nd Precinct (T. 350, 382).

After this initial interrogation, at about 2 P.M., petitioner agreed to go with Beckles and a friendly witness to retrieve what petitioner was still maintaining was his own money. They returned to the 42nd Precinct with the money, and interrogation was begun again immediately, at first by Corbett alone in a room with petitioner. A confession resulted from this interrogation, after Corbett made promises to petitioner:

- - - - -  
\* Petitioner testified that some of the beatings took place in a room with beds (T. 401).



I promised him I;d help him when I get to court.  
(T. 381)

He had to put his trust in somebody and we were  
the ones who could help him and since I was  
working on this case, I would see what I could  
do for him..... (T. 381)

Now you have to put your trust in somebody, and  
we were the ones that can help you...  
(T. 371)

Corbett testified that at no time was petitioner ever advised of his  
constitutional rights (HA 82).

Corbett testified that he and petitioner were alone during the  
confession\* (T. 350; HA 82). The confession was subsequently repeated  
in the presence of other detectives. Petitioner was standing through-  
out and he still had not eaten (T. 339). It was repeated a third time  
to an assistant district attorney and a stenographer, still without  
benefit of rights advice or counsel from the assistant prosecutor  
(T. 375,408,514-432; HA 77,82). Both Beckles and Corbett testified at  
trial (T. 335, 338-40, 375) and again at the Huntley hearing (HA 82-83)  
that other law enforcement officials, including the F.B.I. and an  
Inspector Walsh, who took the statement and who petitioner accused of  
having a major role in the 30th Precinct interrogation and beating he  
underwent to extract confessions and other evidence, were present  
when the confession was repeated. Neither Walsh nor any other law  
enforcement people besides Detectives Beckles and Corbett were ever  
called as witnesses, despite petitioner's attempts at the Huntley  
Hearing (HA 3,5,6,7,8,9,24-25) to have them produced to testify pursuant  
to the mandates which control such confession voluntariness hearings

- - - - -  
\* Petitioner testified that another man was also present who held  
petitioner while Corbett hit him to make him confess (T. 406-407).



(People v. Huntley, 15 N.Y. 2d 72,77; Jackson v. Denno, 378 U.S. 368, 391, 393-394 (1964); N.Y. County Law § 722-b).

Louis Johnson and Joseph Jones \* (HA 45-56; 96-109, respectively) testified at the Huntley hearing that they were present in the police stations during petitioner's detention there -- Jones testifying undisputedly that he was the friend who accompanied petitioner and police on the trip to get the money -- and both gave further testimony that tended to support petitioner's claim that he was beaten to secure the money and confessions. Johnson saw petitioner "pushed.. and hit in the stomach" by a police officer at the 42nd Precinct (HA 49,50). Later, Johnson saw petitioner "lying on the floor like a dog" (HA 50). Jones also saw petitioner "lying on the floor in pain" at the 42nd (HA 101). He watched police officers "drag" the petitioner from one room to another (HA 103).

Beckles and Corbett testified they did not recall Louis Johnson at the 42nd Precinct (HA 60,62,72). Corbett also testified he didn't recall anything about a friend going to assist the getting of the money (HA 86).

Other trial testimony relevant to the issue of the voluntariness of the confessions was that of the Bronx House of Detention Doctor, Joseph Karpowski. Petitioner had testified that his complaints to the doctor were ignored on the first day of his incarceration there and that he was not actually examined by the doctor until four or five days after the arraignment when he again complained of pain from the beatings (T. 423). Dr. Karpowski testified that on February 19,

- - - - -  
\* Joseph Jones is now deceased and Louis Johnson could not be found.



he saw 43 patients between the hours of 12 P.M. and 3 P.M. at the Bronx House, that he saw them four at a time, while sitting and writing and that a single patient would get no more than two or three minutes time including the time it took to dress and undress. Under these circumstances, if a man had bruises, the doctor might not have noticed (T. 430-440; 472-473). The first examination of an entering prisoner is routine, but it is at subsequent examinations that the prisoners come to him with specific complaints (T. 442). Although the doctor obviously had no independent recollection of petitioner's examination, his records for February 19 show no pathological findings or complaints (T. 430).

However, the doctor testified.

I didn't ask him and usually I don't listen, I am not interested whether somebody was beaten up, whether in a fight or so, because that is none of my business. But he told me he was beaten up.  
(T. 499)

The doctor further testified that on February 26, petitioner did come to him complaining of pain from a beating on February 17. The doctor submitted a report to the Warden embodying these specific complaints and those made by petitioner on February 28 and March 3, complaining of pain in the upper lumbar region and hematoma and pain in the area between the rectum and the testicles (T. 442, 446, 461, 464, 466). That the doctor could easily neglect to mention complaints in his own daily records is indicated by the fact that he reported to the Warden that petitioner complained of constipation, even though his own records show no such complaint (T. 490-496).

The doctor further testified to putting in his report to the Warden the results of petitioner's pre-trial mental examination at



Bellevue Hospital which had revealed the diagnosis of "severe character disorder of the schizoid type" (T. 477-478, pre-trial minutes of May 26, 1958 at p. 4 and August 19, 1958 at p. 2).

On cross examination, petitioner was asked if he complained to the judge at arraignment about the beatings. Petitioner testified that he had no counsel at arraignment, had no idea of his rights or "what was happening" and was dragged out quickly after an adjourned date was set (T. 421, pre-trial minutes of February 19, 1958). Petitioner did complain to a correction officer in the pens (T. 421). Petitioner did complain in open court the first time he appeared with counsel (see minutes of February 25, 1958, Martinis, J, Petitioner's Exh. 1C).

The other evidence against petitioner on the trial consisted of the severely attacked identification testimonies of several customers and tellers who were inside the bank at the time of the robbery, which, according to their testimonies, took three minutes. All the witnesses were invited to the Precinct two weeks after the robbery "to identify the robber; they believed they had him and they wanted me to identify him if it was him" (Gruttner at T. 194) or because "they wanted me to identify somebody" (Viselteur at T. 47); "they had a suspect there that they would like me to identify" (Backenheimer at T. 175); or when, "they asked me to identify a suspect they had" (Calabrese at T. 215). In most of the cases, petitioner had been exhibited to the witnesses alone, through a peephole where he was seen to be the only suspect in a room filled with detectives, and the witnesses were asked if this was the man (T. 47-48, 118-125, 155, 160, 175-178, 193-199). Two of the witnesses testified they had viewed a four man lineup, but that petitioner was the only



man dressed in the same grey hat and blue overcoat worn by the bank robber (T. 217, 249). There was also evidence that the bank tellers and officials had opportunity to discuss their identifications with each other, and that at the Precinct the witnesses were viewing petitioner simultaneously. (T. 38,57,144,146,155,156,150,161,200-304, 220, 250).

As to their opportunities to observe, the witnesses testified variously that the robber's face was seen for only a few seconds while he was standing at the witness' side, and the witness was looking straight ahead (F. Kleber at 115-116); that he was seen for a minute (A. Kleber at 143; Calabrese at 213); that the witness got three ten-second looks at the robber (Backenheimer at 171-172,174) or several looks of a few seconds duration (Schneider at 263-264).

Finally, one teller who couldn't identify petitioner identified two \$5 bills found among the cash which petitioner gave up to the police. He identified numbers which he wrote on the bills to avoid recounting, but he didn't know when he'd put the numbers on those particular bills; his marked bills often came back to him; he usually put the numbers on after 2 o'clock in the afternoon (Goldberg at 227,230, 235,241). In any case, petitioner's giving up of this money was a confession which should have been suppressed and it was thus not independent corroborative evidence.

#### B. The Facts Elicited at the Habeas Hearing

Petitioner Alfred Lewis, 41 years old and in State custody since his arrest in 1958, testified that his 1958 trial testimony on the confessions events was substantially correct to his best recollection (HB 15).



The police began questioning him soon after his arrival at the 30th Precinct about a bank robbery and its proceeds, and they accused him of that crime and demanded to have the money (HB 16,19). He was questioned by Corbett and Inspector Walsh in a dormitory room where he was also beaten (HB 19-20, HB 17). He was taken out of the Precinct by Walsh and others and taken to his room which was searched and where clothing and personal property were seized. (HB 17). He was brought back to the precinct to the dormitory and shown-up to witnesses in a different room. He could see the peephole and movement on the other side, and he was directed to stand, turn and change clothing (HB 18-19). He was brought back to the dorm room and seated in a chair and interrogations directed at obtaining the money and his confession resumed (HB 20-21). Somebody was in the room with him at all times, even during one period of a few hours when he was not questioned (HB 21). He was told he had been positively identified and that he should cooperate and produce the money (HB 21).

Petitioner was never advised of his rights, and he was told by Inspector Walsh he could call his family only if he cooperated (HB 22). He remained in that chair throughout the night (HB 26). He did not sleep; he was not offered food and he was beaten (HB 25-27). He continued to maintain that any money he had belonged to him from gambling winnings (HB 28). On the morning of the 18th, Walsh and others took petitioner to Louis Johnson's apartment on 115th Street, broke the door down and brought Johnson and petitioner back to the 30th Precinct where petitioner was still being kept as of 10:30 A.M. (HB 28). By the morning petitioner was "tired, weak, exhausted, almost beaten" (HB 29-30).



After arriving at the 42nd Precinct in the early afternoon of the 18th, interrogation and beating continued and someone told him the assault charge would be dropped if he confessed and produced the money (HB 31). Corbett told him he'd stay in the precinct until they got the money (HB 32). Petitioner finally told Corbett that the money was on a roof, but that he didn't know the address (HB 33). Corbett ordered petitioner to take him to the money, and petitioner agreed "because I didn't see no way out of that" (HB 33). After a couple of minutes break, petitioner told Beckles he wouldn't take them to the money, and Beckles said if he took them to it, his contention that the money was gambling winnings would not be attacked and he'd get a receipt. (HB 35-36). Beckles also told petitioner that he wouldn't get a deal like this after he (Beckles) left the case as he was about to do. Petitioner agreed if Joey Jones, who had been arrested in the same apartment building shortly after Johnson's arrest and whom petitioner had seen in the 42nd Precinct, could go along. Petitioner was afraid the police would steal the money as they had stolen others of his personal articles (HB 36-37). They went to get the money. Beckles told petitioner he'd get a receipt back at the station house; at the stationhouse, Corbett told him he'd get a receipt in the mouth and that since they had the money, petitioner might as well confess (HB 36-40). Petitioner did not recall a promise of help from Corbett (HB 44). Petitioner confessed, giving Corbett the answers he knew the police wanted (HB 39-41).

The last time petitioner had eaten was breakfast on the morning of the 17th, some 30 hours prior to the confession. He made no request for food, because "they were applying that pressure, you know, and I couldn't think of giving me something to eat. because they weren't



going to do it." (HB 41, 40-41)

Petitioner was made to repeat the confession before Inspector Walsh and a roomful of police and then once again to an Assistant District Attorney and a stenographer.

Petitioner testified on the hearing that at the time of trial he didn't recall the promise of "help" from Detective Corbett (testified to by Corbett at trial (T. 371, 381), because at that time he thought only beatings were important and the promise had apparently occurred shortly before or after the beatings by Corbett; it was only later, after his study of the law, that he learned the significance of promises. By that time, however, this specific "help" promise by Corbett was lost to his memory (HB 44).

Petitioner testified further that at the start of the interrogations he told the policemen he didn't have to lead them to the money; he didn't know if this was in fact a "right," but he tried it. By the time he confessed, he knew for a fact that if he didn't lead them to the money he would be kept there indefinitely and beaten further. After he did lead them to the money and they admitted that their promise of safekeeping "was just a sham, you know, this also had an effect on my condition, you know, on bringing me closer to the point where I couldn't resist nothing else, you know (HB 46).

Dr. Lawrence Lichenstein, Chief Psychologist at Kings County Hospital, testified that the Bellevue Hospital diagnosis of petitioner in March and June, 1958, in evidence at these proceedings,\* described

- - - - -  
\* The March 25, 1968 report stated, "In summary, there is no evidence of psychosis or mental defect. The diagnosis is: Severe Character Disorder, Sociopath of the Schizoid type, a type of individual who, under stress and strain, may develop a psychotic episode in future," The June, 1958 report confirms this diagnosis.



an individual who, "tends to be rather infantile and immature, has a low frustration tolerance and prone to panic under stress" (HB 49). The witness testified that, "the literature indicates that the sociopath reacts mostly to the feeling of being trapped and confined and it is that kind of stress and strain that is most capable of producing the psychotic episode" (HB 51). The psychiatrists who prepared the report called petitioner's disorder "severe" indicating that petitioner was significantly predisposed to psychosis (HB 51). In Dr. Lichenstein's opinion, based on the Bellevue diagnosis, petitioner probably had a psychotic episode under the circumstances of the two day confinement that produced the confession, and the psychotic break was not "contingent upon the physical brutality" (HB 53-56).

Dr. Lichenstein testified further that while in the midst of a psychotic episode, a person cannot think "clearly or logically or rationally" and there is impairment in "reality testing" and "disorder of emotion" (HB 50,52). Resistance to authority pressures would be weakened (HB 53). A psychotic break can be as short as an hour and as long as years (HB 50). Even though the Bellevue report prognosticated a psychotic episode, it was quite possible that petitioner had already had one a month before the diagnosis, when the confession was extracted from him. The interviewing psychiatrists would not have known of it unless petitioner had described it to them, and there is no evidence that they questioned him about any psychotic episodes, let alone about the period after his arrest, or that petitioner understood that he'd had a "psychotic break" (HB 50-51, 52, 58).\*

\* The Attorney General's question, "If one were to question a patient who allegedly had such a break, question him about it a short time afterwards, would he be likely to recall..." (HB 58-59) was not founded, because it assumed a fact not in evidence, i.e. that petitioner was questioned about the specific psychotic episode of February 17-19, 1958. The reports contain no indication that the psychiatrists directed petitioner's attention to the events immediately following his arrest; thus (footnote continued p. 15)



Finally, the witness testified that even if petitioner had not had a psychotic break on February 17-18, under those circumstances, and in his condition, petitioner's powers of reasoning and resistance to authority would have been weakened (HB 56).

Vincent Beckles arrested petitioner "on a complaint of a woman that he had threatened her with a gun". \*\* Noticing a flier at the 30th Precinct desk and recalling that the complainant mentioned a bag of money, Beckles called the 42nd Precinct about witnesses to the bank robbery which was the subject of the flier (HB 62). That evening Beckles and other detectives offered food to petitioner but he didn't accept it (HB 63\*\*\*). The witness does not know if petitioner ate or slept that night and morning (HB 77). Throughout the night and morning, the witness and "a superior officer,"\*\*\*\* and other detectives questioned petitioner about the bank robbery (HB 66,74,80-81). Petitioner was sitting in a chair where "he was left," and somebody was always with him throughout the night (HB 64,74).\*\*\*\*\* Since he was not questioned

-----  
\*(Footnote continued from p. 14)petitioner's failure to mention it or to characterize his own behavior at that time is not evidence that no psychotic episode took place.

\*\* Neither a threat with a gun nor any other threat was mentioned by Beckles in his 2 previous testimonies, and the woman, Mrs. Waller, did not testify to an assault.

\*\*\* Beckles never mentioned this offer of food in his 2 prior testimonies in this case in 1958 and 1970, even though he testified that he did not know if petitioner had eaten (T. 336, 340-341).

\*\*\*\* Petitioner testified that Inspector Walsh participated in the questioning and beating.

\*\*\*\*\* At the Huntley hearing, Beckles was asked, "And was anybody else in there with him at that time, any detectives?" Beckles replied, "No. Maybe at one time a detective would look in" (HA 68069). Corbett testified at the Huntley hearing that he was never in the room with petitioner at the 30th Precinct (HA 79), but that he saw petitioner sitting on a bed in the room (HA 73a). Petitioner testified at trial he was seated in a chair (T. 402).



in the squad office, and since the only other room he was in that night was the dorm room, it was in the dorm room that petitioner was questioned. He thus was not sleeping there (HB 63-73,74-75).

All witnesses to the robbery were brought to the Precinct at 10, 11 o'clock or a little later and Beckles learned that they had viewed petitioner and identified him as the robber (HB 70-71). After the identifications, Beckles spoke to petitioner relevant to the bank robbery (HB 73).

On the night of February 17 after petitioner had been taken into custody in the 30th Precinct, "quite a few detectives," without search warrants, acting on some addresses they found on paper on petitioner's person, searched the apartment of the friend of petitioner, Louis Johnson, who was later brought to the 42nd Precinct. Petitioner testified he was taken along on this expedition; he saw the police break down the door (HB 28). Beckles testified he didn't know how the friend got to the precinct (HB 78-79)\*. Beckles also testified that at some time in the night/morning of the 17-18th, "we was going out with Mr. Lewis at one point, we were going out" (HB 75).\*\*

Beckles, who was involved with the case from 8:30 P.M. on the 17th to the evening of the 18th, and who knew early in that period that petitioner was identified as the robber, made no effort to book or arraign him on the morning of the 18th, although he could have done so (HB 71-72). Although after the show-ups a decision had been made to

- - - - -

\* At the Huntley hearing, Beckles testified that he didn't see Johnson in either precinct (HA 60). Petitioner and Johnson himself testified that the latter was arrested and brought to the precinct (HB 28, HA 46).

\*\* Petitioner testified that they took him out of the precinct to his room and searched it and seized personal articles and clothing, and that they took him to the apartments of Joseph Jones and Louis Johnson where further searches were made and Johnson was arrested (see supra).



turn petitioner over to the 42nd Precinct for booking on the robbery and although that could have been done first thing on the morning of the 18th, petitioner was not taken there until the afternoon of the 18th, and he was not booked at the 42nd until after his confession at around 5 P.M. (HB 69-73; See Corbett at HB 96).

Once at the 42nd Precinct, Beckles told petitioner that "he should tell where the money was because it was his money and he could continue to say it was his money," and that the people at the 42nd wanted the money and he (Beckles) would soon be leaving and would have nothing more to do with the case (HB 76), and that, "If it is your money and you won it gambling, it should belong to you" (HB 67). The precinct was filled with F.B.I., high brass and lots of detectives at this time (HB 77).

William Corbett was in charge of the instant bank robbery investigation, "a very big case" in his estimation (HB 97). He got to the 30th precinct before midnight on the 17th and stayed until 12 noon of the next day but never questioned petitioner (HB 84,87). After the show-ups, "other higher ranking officers... for purposes, I suppose of continuity and they just kept interrogating him and trying to find out certain other details of the case and for whatever reason they just decided to keep him there..." (HB 85). Petitioner was "questioned about this money all night long" (HB 86, and kept "insisting all night" that the money was his (HB 89)\* Corbett learned at midnight that the witnesses had identified petitioner as the robber; the interrogation thereafter was for the purpose,

- - - - -  
\* Thus, contrary to his prior testimonies that he was not in the dormitory room at the 30th precinct and that he did not know the nature of the questioning there (HA 73a,79), Corbett did know very well what was going on inside that room. Petitioner testified Corbett was there participating in the interrogation and the beatings, and Corbett testified he saw petitioner sitting on a bed (HA 73a).



to recover the money and weapons.. If he gives us the money and he gives us the gun, he's confessing to the crime (HB 93).

Corbett, a 20 year veteran of the police department, testified that "perhaps" petitioner could have been arraigned on the morning of the 18th on the basis of the identifications (HB 94), but that he wasn't even booked until 5 P.M. until after he confessed and gave up the money (HB 94, 96-97).

Corbett testified that petitioner was taken out of the precinct during the night,

There seems to be a period of time when he was taken to another location and the details of that I don't know because I wasn't in on the question of that exactly, but I do recall we went to another premises in Harlem somewhere and I think he was with us at the time... (HB 87)\*

After petitioner was taken to the 42nd Precinct, the next day at noon, Corbett questioned petitioner, but didn't advise him of his rights (HB 94-95). The F.B.I. and other policemen were in the precinct at the time (HB 95). Corbett had not seen petitioner eat or sleep (HB 95), and petitioner had been "insisting all night" that the money was his (HB 89). Corbett thought petitioner finally gave up the money because "maybe he thought it was his" (HB 89).

After the money was retrieved, Corbett interrogated petitioner again and "refreshed his memory or brought to mind the fact that the incident [identifications] had occurred the night before and...told him that he was a gambler and that he gambled and lost" (HB 89). Corbett testified it was possible that he had promised to help petitioner if

-----  
\*Beckles testified that the police raided the rooms of persons whose names and addresses were found on petitioner's person, and petitioner testified to the same thing and to the fact that he was also taken to his own room which was searched (See supra).



the money was revealed (HB 94-95) and he didn't recall if he told petitioner to get the money so it could be safeguarded (HB 97).\*

Corbett testified that Inspector Walsh was dead (HB 98).

## A R G U M E N T

### POINT I

CONFESSIONS \*\* OBTAINED FROM A MENTALLY UNSTABLE UNEDUCATED 22 YEAR OLD, DURING A 38 HOUR PERIOD OF INCOMMUNICADO DETENTION, AN UNREASONABLE DELAY OF, AND DETOUR FROM, ARRAIGNMENT FOR THE VERY PURPOSE OF EXTRACTING CONFESSION, DURING WHICH PERIOD WITHOUT SLEEP, FOOD OR RIGHTS ADVICE, HE WAS SUBJECTED TO CONTINUOUS 19 HOUR OVERNIGHT INTERROGATION BY SEVERAL POLICEMEN, PROMISES AND DECEPTIONS, NIGHTTIME FORAYS TO APARTMENTS AND PEEPHOLE SHOWUPS, ARE INVOLUNTARY AS A MATTER OF LAW.

---

#### A. THE FACTS ESTABLISHED

The evidence adduced at three hearings has established beyond question, without substantial factual contest by the State of New York, and so the District Court has found, "particular factors or groups of factors which, when included in the totality of circumstances, require that a resulting confession be invalidated on grounds of coercion...

- - - - -

\*Includes the giving up of the money, the oral confessions to Corbett and to a group of detectives and the stenographic confession to the District Attorney.

\* At trial, Corbett had testified he told petitioner it was to his benefit to have the gambling proceeds in the safekeeping of the police (T. 367) and that he would help petitioner if the money was revealed (T. 371,381). If petitioner gave up the money because "he thought it was his" (Corbett, HB 89), somebody had assured him it would be safeguarded.



which would... mandate a finding that [petitioner's] confession was obtained in violation of his due process rights" United States ex rel. Lewis v. Henderson, 520 F. 2d 896,901 (2d Cir., 1975) (remanding to the District Court for the purpose of such findings ). After the hearing ordered by this Court, the District Judge found the factors enumerated by this Court upon petitioner's allegations and decisions of the Supreme Court, to be, "vindicated so substantially as to permit no other result" (slip op. of July 16, 1976 at p. 16), "undisputed" (Ibid), "solidly established by the several records of evidence in this case" (Id. at 17), "establishe[d] conclusively" (Id. at 18), "clear to the point of being substantially undisputed on this significant set of conditions" (Id. at 19), and proved "beyond any serious question" (Id. at 23). The District Court was, in its words, "driven compellingly toward the granting of the writ" (Id. at 16). In the face of the overwhelming evidence in the hearing records supporting the District Court's findings and the District Court's additional opportunity to judge the credibility of the witnesses who appeared before him after two prior State hearings on the matter, its decision cannot be set aside. The State has not, and, indeed, could not in any way, demonstrate that the findings were "clearly erroneous" F.R. Civ. P. 52(a). The District Court fully carried out the remand mandate of this Court to investigate the presence of the enumerated factors in the totality of coercive circumstances. The State, not the District Court, misinterprets this Court's mandate when it seeks to have it read as the oft proscribed simple "color-matching" of the exact facts of one coerced confession case with another. Mancusi v. United States ex rel. Clayton, 454 F. 2d 454, 456 (2d Cir) cert. den. 406 U.S. 977 (1972); see opinion below at p. 21. The State, for example, would have this Court hold that the District Court was in error because the defendant in Haley v. Ohio, 332 U.S. 596



(1948), cited by this Court in its remand opinion, was 15 years old whereas petitioner was 22 at the time the confession was taken; youth and immaturity under police pressure would, therefore, only be considered as to 15 year olds. This, of course, is nonsense, and this Court so held:

Although not all of the factors of Haynes or Haley (or of any other cases for that matter) are present here, the same type of techniques designed to overbear the defendant's will were allegedly used.

Lewis V. Henderson, 520 F. 2d 896 at 902.

1. "He was never once, during the whole period of pre-arraignment interrogation, advised of his right to remain silent or of his right to counsel." 520 F. 2d at 901.

Petitioner so testified (HB 22\*), and the police witness confirmed this fact (HA 82, HB 94-95). The State has never contested this fact and has never brought forward a police officer to say he so advised petitioner.

2. Petitioner was "held for approximately 38 hours by the police during which time he was neither booked nor arraigned and questioned during most of the first half of this period" 520 F. 2d at 901.

Petitioner so testified and the police witnesses confirmed these facts (See Statement of Facts, supra). It is clear from the undisputed facts and circumstances and the admissions of Corbett and Beckles, that the very purpose of withholding petitioner's arraignment was to obtain a confession from him. (HB 85,86,93). The police testified that early in the morning of February 18, only a few hours after petitioner's

- - - - -  
\*"T" numbered references are to the mid-trial hearing; "HA" numbered references are to the Huntley hearing, "HB" references are to the habeas hearing before the District Court.



arrest, the bank witnesses who would eventually identify petitioner at trial, identified him at the 30th Precinct as the bank robber (HB 70-71,93). There was thus cause to arrest and arraign him on the bank robbery\* at that time or as soon as a magistrate became available the next morning \*\* (HB 71-72, 93-94). However, the police continued to interrogate him throughout the night after the identifications had been made; they took him on warrantless nighttime searches and an arrest without probable cause of a person whose name and address  
- - - - -

\* This cause was not cognizable as "probable cause" under the Fourth Amendment because it was the direct fruit of a Fifth and Fourteenth Amendment due process violation, the impermissably suggestive show-up wherein petitioner was exhibited alone to the witnesses gathered in a group for the peephole identification session. (See Statement of Facts, supra). See this point and Point III, *infra*. United States v. Edmonds, 432 F. 2d 577 (2d Cir., 1970); Gilbert v. California, 388 U.S. 263 (1967); United States ex rel. Stovall v. Denno, 388 U.S. 294 (1967); Foster v. California, 394 U.S. 440 (1969); Wong Sun v. United States, 371 U.S. 471 (1963). Furthermore, petitioner's initial detention was apparently not based on probable cause to believe he had committed an assault on Mrs. Waller. Mrs. Waller, according to her trial testimony, did not tell Detective Beckles that she had actually been assaulted by petitioner (T. 275-296, 322), although Detective Beckles, for the first time at the habeas hearing, testified that Mrs. Waller told him she had been assaulted with a gun (HB 60). This bank robbery received city-wide notice and was "a very big case"; petitioner submits his arrest was based on Waller's mention of the bag of money if anything. Given the show-up, the warrantless and "causeless" search of petitioner's room, the warrantless and causeless search of his friend's apartment simply because the name was found on a slip of paper in petitioner's pocket, and the practices used to extract the confession, it is apparent that there was a general climate of disregard by the police in this case for constitutionally mandated procedures. To the extent that the confession was the fruit of all of the above, it must be suppressed. Wong Sun, supra; Brown v. Illinois, 95 S. Ct. 2254 (1975).

\*\* The former Code of Criminal Procedure §165 mandated that petitioner be brought before a magistrate without unnecessary delay.



was found on petitioner's person (HB 66,74,78,81,85-86,89); they took petitioner to his own room and searched it without a warrant or probable cause (HB 17,75,87); and they further detoured his arraignment on the morning of the 18th, taking him to the 42nd Precinct where he was further interrogated, urged to reveal the location of the bank money and promised help, but not booked or photographed or fingerprinted or arraigned. Indeed, he was not "processed" until the late afternoon of the 18th, sometime around 5 o'clock, after he had finally confessed and revealed the location of the bank money, and he was not arraigned until 10 A.M. the morning of the 19th, 38 hours after his arrest. The police conceded at the hearing that this was "a very big case" and their major concern was finding the money (HB 69-73, 85,93-94, 96-97); they were holding and interrogating petitioner incommunicado under all the surrounding coercive circumstances so he would eventually give up that information and abandon his assertion of innocence, held for 19 hours after his arrest, that he had some gambling money that he would not give up to the police. Thus, the delay in arraignment was unreasonable, used for the unconstitutional purpose of extracting a confession by coercive techniques, Clewis v. Texas, 386 U.S. 707,711 (1967).

A confession given after denials of guilt have been disrespected by the police and tactics have been employed by them to wear away the denials is not voluntary, because,

It is apparent that the petitioner's lack of education and knowledge of his rights coupled with the circumstances of prolonged custody and repeated periods of questioning by trained interrogators convinced the petitioner that "the police wanted answers and were determined to get them."

Mancusi v. United States ex rel. Clayton, 454, F. 2d 465 (2d Cir., 1972) cert. den. 406 U.S. 977.



Certainly the withholding of, or the capitalization upon, the absence of food, sleep, rights advice, arraignment and counsel appointment was consistent with the conceded police objective, the well organized techniques for overbearing petitioner's expressed will to resist self-incrimination. Miranda v. Arizona, 384 U.S. 436 (1966). As Judge Mansfield has stated in a case close to this one, United States ex rel. Castro v. LaVallee, 282 F. Supp, 718 (S.D.N.Y. 1968),

Since Castro had been identified by Minerva Rosario as the assailant, it is clear that the police interrogation was essentially incriminatory rather than merely investigatory in nature. The objective of the police was not simply to obtain information about crimes, but also to induce Castro to incriminate himself and thus clinch their case against him for felonious assault based on the eye witness identification. See Clewis v. State of Texas, 386 U.S. 707, 711-712, 87 S. Ct. 1338, 18 L. Ed. 2d 423 (1967). At the same time they were interested in determining whether he had been involved in the homicide of Meresa Gee [282 F. Supp. at 725-726]. These circumstances provide the basis for the not unreasonable inference that if Castro had not been subjected to such an all-night session, without food and sleep, he might not, at 11:15 A.M. on the following morning have furnished the crucial recorded statement used at his trial.

282 F. Supp. at 728 (emphasis added)

See also Haley v. Ohio, 332 U.S. 596, 598, 604-607, 68 S. Ct. 302, 92 L. Ed 224 (1948) (concurring opinion, Frankfurter, J.)

No law of this land "forgives" the requirements of the Constitution in the "name" of law enforcement. Berger v. New York, 388 U.S. 41, 59 62-63 (1967). Appellant, nonetheless, urges the Court to adopt a position that the police and the District Attorneys had the "right" to delay and detour arraignment, to hold petitioner indefinitely until he confessed, to question him continuously overnight under obvious coercive



circumstances, because they had cause to believe he had committed a crime, and because all the above tactics were necessary to get further information about the crime (See Appellant's brief, at pp. 9-11). In the process of this argument, appellant concedes, as the police admitted at the hearing, that the delay in arraignment was for the very purpose of gaining self-incriminatory information from petitioner. This purpose in itself gives the color of coercion to all the attendant circumstances in this case resulting in the confessions, and no case, State or Federal, has upheld a police practice of arraignment delay at the will of the interrogator; the delay will be countenanced only where there is, "no showing that it was for any purpose other than the legitimate one of routine processing." United States v. Barrera, 486 F. 2d 333, 338 (2d Cir., 1973); United States v. Middleton, 344 F. 2d 78 (2d Cir., 1965); People v. Alex, 265 N.Y. 192, 195 (1934); People v. Townsend, 33 N.Y. 2d 37 (1973); Clewis v. Texas, 386 U.S. 707, 711 n. 7 (1967). In a recent case in this Court a defendant was detained and overnight at West Street where he slept and ate/was not subjected to interrogation during the night, but his statement the next morning to a prosecutor was suppressed.

Unarraigned and uncounseled for 20 hours, the defendant is taken through the questions answered the previous day, this time with a warning from the prosecutor that if the case goes to trial, he can be sentenced to 100 years in prison.... Prosecutors engaging in such a practice [of pre-arraignment interviews] must be particularly scrupulous to observe the cautions of Miranda that the accused not be threatened, tricked or cajoled into a waiver.

United States v. Duvall, 537 F. 2d 15<sup>27</sup> (2d Cir., 1976)

A comparison of what was done in the 20 hour period in this case with the same period in Duvall, and the sum and substance of the pressures



applied to petitioner in that period should lead this Court to reject appellant's argument that delay in arraignment for the purpose of coercive interrogation was legitimate in this case.

3. "During his extended period of detention before and after confession, Lewis was not allowed to make any telephone calls, was not allowed to see anyone and, with one minor exception, saw and spoke to no one but the police."  
520 F. 2d at 901.

Petitioner so testified and the police witnesses confirmed that he was never advised of his rights in this, or any other, respect (HB 82); the State never called as a witness, when he was alive, and a request was made for his appearance, the now deceased Inspector Walsh whom petitioner testified refused his request to call his mother unless he cooperated (HB 22\*); and, to quote this Court in this case (relying on Haynes v. Washington, 373 U.S. 503 (1963)), "the circumstances of his confinement implied that he would be allowed to see no one until he confessed." 520 F. 2d at 901.

In an effort to mitigate such failure of rights advice, given great weight by the Court under circumstances similar to this case, the State contends that if Castro had requested the presence of his mother or sister, they would have been permitted to attend the interrogation... Castro testified, however, that his requests were denied... the undisputed fact remains that he never had the benefit of the presence or advice of counsel or of an adult friend or relative. Confronted as he was with a group of mature police officials seeking to extract an incriminating statement from him, the mere fact that Castro was unsophisticated and unaware of his rights does not provide a basis for penalizing him. Nor does it nullify the coercive situation and the failure of the police to furnish Castro with the information that was essential if he was to exercise his constitutional rights intelligently.

United States ex rel. Castro v. LaVallee, infra, at 726

- - - - -  
\*At the Huntley hearing, petitioner sought to have Inspector Walsh produced to testify concerning the physical beatings he gave petitioner, but petitioner's request was denied and petitioner's allegations in this respect were never refuted by the State (HA 3-9,24-25).



Two people known to petitioner were in the precincts arrested because their addresses were found on petitioner (HB 36,78-82 ,HA 45-56, 96-110). One was allowed to go on the money trip, but neither was permitted to assist petitioner in any way. While petitioner was in effect friendless during the interrogations, except for the above "minor exception" (520 F. 2d at 901), the precincts were filled with State police, detectives and the F.B.I. adding to the atmosphere of intimidation (T. 331,335,338-40,375, HA 66,82-83, HB 77,95).

4. "Lewis was continuously interrogated throughout the night on February 17 and on into February 18 on an intermittent basis without being given any real opportunity to sleep or any substantial food." 520 F. 2d at 901

Petitioner so testified (T. 399-401, HB 16-19, 25027,40-41) and the police witnesses confirmed that petitioner was questioned throughout the night and morning and afternoon of the next day, and they testified they never saw him eat or sleep (T. 337,350,354-360,382; HA 64,68,73a,74; HB 66,74,77,80-81,85-86,89,93,95). Detective Corbett testified originally that he thought petitioner did not sleep (T. 382). At the habeas hearing, eighteen years after the events and after two previous occasions on the witness stand in 1970 and 1958, the experienced law enforcement officer, Detective Beckles, testified for the first time that he offered petitioner some food at some point early in the first evening of petitioner's arrest. He, nonetheless, adhered to his prior testimonies that he didn't see petitioner eat or sleep (HB 77). Petitioner testified that under the circumstances, because of the pressures being applied to him he "couldn't think of giving me something to eat," and he didn't believe in any case that a request for food would be honored (HB 40-41). Haynes v. Washington, supra, as cited



in Lewis v. Henderson, supra at 901. Even if Beckles first-time testimony of a food offer is credited, as the District Court has said of similar circumstances in another case,

He was asked if he wanted a hamburger, and he declined. This testifies to the decency of the police. It does not suggest that petitioner was in good shape. Rather, it indicates a state of exhaustion, near breakdown, illness, extreme tension and resultant loss of appetite, notwithstanding the need for food (to say nothing of rest) for effective functioning.

United States ex rel. Delle Rose v. LaVallee,  
342 F. Supp. 567,574 (S.D.N.Y.1972) rev'd  
on other grounds, 410 U.S. 690 (1973).

The offer of food is not the significant factor; continuous overnight interrogation of a person who has not, or could not have eaten and slept, is significant, for the will-breaking interrogation takes advantage of the resultant weakened condition of that person.

There is a conflict between Castro's testimony and that of others as to whether he was actually denied or deprived of food, drink and toilet facilities, various witnesses testifying that relatives and friends of other suspects were seen bringing coffee, food and drink into the station house where it was given to the police for other suspects. Even, assuming, however, that food and drink were not intentionally withheld from Castro, the significant factor, for purposes of determining whether the statement given by him on the following morning was a voluntary one, is that he had not in fact had any food, water, sleep or use of toilet facilities for over 12 hours. Under such circumstances the absence of any intent to deprive him of these essentials is immaterial. See Davis v. State of North Carolina, 384 U.S. 737,746, 86 S. Ct. 1761, 16 L. Ed. 2d 895 (1966). While the effect upon his strength and will to resist cannot be precisely measured, he was undoubtedly rendered more susceptible to psychological pressures, to 'pushing' by Mr. Farlane, and to leading questions put to him by police and the assistant district attorney, than if he had been accorded a night's rest and food and drink prior to giving his formal statement.

United States ex rel. Castro v. LaVallee, 282 F. Supp. 718,727 (S.D.N.Y. 1968) (Mansfield, J.)



5. "Lewis, at the time of his confession was a young, 22 year old black man of limited education with apparently little prior experience with police methods, thus rendering him particularly susceptible to police pressure." 520 F. 2d at 901.

Petitioner's age at the time of the confession is undisputed as is his 9th grade education at that time. Also undisputed is his "particular susceptibility to police pressure" by virtue of a diagnosed,

Severe character disorder, sociopath of the schizoid type; a type of individual who, under stress and strain, may develop a psychotic episode in future. (Bellevue Hospital Psychiatric Report, March 25 and June 6, 1958; Petitioner's Exhibit 4).

Based on this report, Dr. Lawrence Lichenstein, Chief Psychologist at Kings County Hospital, with ten years experience in the preparation of such reports, testified that petitioner, subjected to the coercive circumstances in this case of prolonged confinement and interrogation, beatings aside, could well have had a psychotic break (and probably did have one) causing him to lose rational touch with reality, ego strength and the ability to withstand the pressures of the trap (H B 49,50-53).\* Dr. Lichenstein also testified that petitioner's delicate mental state, evidenced by the specific diagnosis of "severe character disorder" would have rendered him incapable of withstanding the police pressures, even if he had not had an actual psychotic break (HB 56). Judge Mansfield in United States ex rel. Castro v. LaVallee, supra, at 724, considered a Bellevue diagnosis of "personality pattern disturbance" as bearing on the totality of coercive circumstances in that case. Here, in addition, is expert opinion interpreting the diagnosis and relating it directly to petitioner's breakdown of the will to resist. Petitioner's 16 or 19 hour resistance to the police pressures

\* Dr. Lichenstein also testified that psychotic episodes are of varying durations and would not necessarily leave one so afflicted with apparent symptoms, and that although the report predicted such episodes in petitioner's "future," he could have had one when the confession was made, during the month or two prior to the diagnosis (HB 50,52,58).



to confess, establishes that there was, at the start of the interrogations, a "will to resist" (Mancusi v. United States ex rel. Clayton, supra, at 456); the psychological evidence and the law which does not tolerate confessions given under the above circumstances, establishes that the will was destroyed.

Although "[I]t is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations..." (Miranda v. Arizona, supra at 468,

In the case at bar the evidence undisputedly establishes the strongest possibility that Blackburn was insane and incompetent at the time he allegedly confessed... And when the other pertinent circumstances are considered...the chances of the confession's having been the product of a rational intellect and a free will become even more remote... this Court has in the past reversed convictions where psychiatric evidence revealed that the person who had confessed was "of low mentality, if not mentally ill, Fikes v. Alabama, (352 U.S. 191 at 196), or had a history of emotional instability" Spuno v. New York (360 U.S. 315 at 322)... ... a judgment which must always be one of probabilities.

Blackburn v. Alabama, 361 U.S. 199, 207-208 (1960)  
Emphasis supplied.

In Blackburn, the Court relied on reports which concluded that the petitioner there, as here, could have been in the throes of a psychosis at the time of the confession, even though "it is possible, for example, that Blackburn confessed during a period of complete mental competence," (361 U.S. at 208), and even though the evidence of witnesses to the confession showed that Blackburn, "talked sensible, was clear-eyed and did not appear nervous" (361 U.S. at 209), and "was said to answer questions "relevantly and coherently." (361 U.S. at 210, n. 8) .

Appellant argues that since petitioner had a prior conviction for which he was incarcerated, petitioner may have known his rights at the



time he confessed or his confession was thus somehow otherwise voluntary. There is no evidence that petitioner was coerced to confess to the prior crime or informed of his rights relative to confessing or that his experience there as a teenager in any way equipped him to resist the pressures exerted in this case. It is true that after his arraignment and for the last 20 years petitioner has attempted to educate himself on the law surrounding the case and the taking of his confession, but this again does not prove an ability to resist the incommunicado interrogation pressures applied over a 19 hour period in this case prior to the arraignment. "No lawyer in petitioner's condition would trust himself at the closing of a sale of a corner kiosk" United States ex rel. Delle Rose v. LaVallee, supra, at 575. Under the totality of coercive circumstances of this case even if petitioner had been given rights advice this would have been of "little significance" as a factor rendering the confession voluntary. Sims v. Georgia, 389 U.S. 404,407 (1967).

It was the unrefuted professional opinion of a highly qualified psychologist that the 1958 Bellevue diagnosis of petitioner, then 22 years old, indicated an individual who, "tends to be rather infantile and immature, has a low frustration tolerance and prone to panic under stress" (HB 49), an individual who, based on the "severity" of the disorder according to the 1958 diagnosis, probably broke under the stresses exerted by the police (HB 55-56). Thus, appellant misstates the evidence when he asserts, "neither is there any indication here of a person of immature mental age." (p. 8 of appellant's brief).

As in Davis v. California, 384 U.S. 737 (1966) there is in this case "specifically noted and commented upon" (Id.) by two psychiatrists



who examined petitioner in 1958\* and a qualified psychologist who interprets their diagnosis in 1976, a person of immature mental age and predisposition to psychosis under stress and strain. The 1958 report cannot be ignored. It is fact, and it is in evidence, and it is contemporaneous with petitioner's confessions, and it tells us much about his mental state at that time. If it cannot be ignored, then qualified interpretation of its meaning for the purposes of these proceedings cannot be ignored, especially when appellant, who apparently was unwilling or unable to adduce evidence to the contrary, does not contest the fact that a qualified diagnosis was made in 1958 to the effect that petitioner was prone to break under stress and strain. Not Dr. Lichenstein, but the psychiatrists at Bellevue in 1958, made this diagnosis of psychotic break based on their interviews with petitioner. Dr. Lichenstein has interpreted this diagnosis on its own terms, "severe" character disorder and predisposition to psychosis under stress. His testimony is totally credible when he explains the absence in the report of specific reference to a probable psychotic episode during the 38 hour pre-arraignment period, by the scientific fact that these episodes can come and go without leaving apparent symptoms. The doctors in 1958 thought this man was prone to such breaks in general, and their diagnosis was based on general examination of him. Dr. Lichenstein merely testified that there was no way for them to know of a specific break, because their attention and the attention of the petitioner had not been directed to it (HB 51), but, given their diagnosis, and the direction of Dr. Lichenstein's attention to the

- - - - -  
\* One of these doctors, according to officials at Bellevue, is dead, and the other, having left Bellevue years ago, could not be located.



specific circumstances, the probable diagnosis was psychotic break. Since we are dealing at best with "probabilities" in the scientific conclusions on involuntariness issues (See Blackburn v. Alabama, supra,) and since the State has no evidence reducing the probabilities in this case, Dr. Lichenstein's opinion stands and has great weight.

6. "The police detectives made various promises to petitioner, including an offer to "help" him with his case if he confessed and a pledge that his claim of ownership would not be challenged if he would only retrieve the money. Furthermore, his agreement to retrieve the money and his confession followed soon after these false promises, underscoring their effect upon his will." 520 F. 2d at 901.

Petitioner testified that at the 42nd Precinct shortly before his taking the police to the money, he was told by his interrogators that the criminal charge in Manhattan for which he was ostensibly arrested but never booked or arraigned would be dropped, that his money would be safeguarded and his assertions of innocence sustained if he gave up the money (T. 405, HB 31, 35-36). Detective Beckles testified that he in effect promised petitioner that if he disclosed the location of the money, his position that the money belonged to him as the result of winning same at gambling would not be impugned (T. 325,326; HB 67,76). Detective Corbett testified that he backed up this promise by telling petitioner it was to his benefit to have his gambling proceeds in the safekeeping of the police (T. 367)\*/. After the return from retrieving the money, Corbett, according to his trial testimony, continued to interrogate petitioner to get him to admit the money came from the bank, and told petitioner,

- - - - -  
\*At the habeas hearing, Corbett testified he thought petitioner gave up the money because "maybe he thought it was his" (HB 89). If this is so, somebody gave petitioner the impression that his money would be safe with the police.



I promised him I'd help him when I get to court.  
(T.381)

He had to put his trust in somebody and we were  
the one who could help him and since I was working  
on yhis case, I would see what I could do for him..  
(T.381)

Now you have to put your trust in somebody, and we  
were the ones that can help you... (T. 371).

It is apparent from Beckles own testimonies to the effect that upon his arrival with petitioner at the 42nd Precinct he told petitioner he was leaving and the case was out of his hands and the best thing petitioner could do was give up the money (T. 325-326, HB 76), and that petitioner would get no more deals once he (Beckles) left the 42nd (HB 36), and from the fact that petitioner chose Beckles, who is black, to go with him for the money, and from the fact that petitioner has not accused Beckles of participating in the beatings, that Beckles was playing the "nice guy" role, as opposed to Corbett's belligerence. This is another well recognized technique of confessions interrogation. In this context, even if Beckles did not "make it clear" that petitioner could keep the money if it was found to have been taken from the bank (HB 68), his suggestions that the money "should belong to you" (HB 67) and "he should tell where the money was because it was his money and he could continue to say that it was his money" (HB 76), together with Corbett's promise of safekeeping (T. 367, HB 89), were enough to engender a belief in petitioner's mind, in his condition at the time, that a promise had been made. That this was Beckles' intention is apparent from the very fact that he did not "make it clear."

In reply to appellant's contention that Detective Beckles' testimony on the matter disposes of any question that the petitioner was promised that his claim to the money would not be contested if he produced the money, an examination of the record on the matter gives strong support



to the petitioner's contention in this regard. The petitioner testified (HB 35-39) that he was told by Detective Beckles that his ownership of the money as gambling winnings would not be impugned, that petitioner would get a receipt for his money and that it would be returned to him, that petitioner would not get another such offer because he, Beckles, was returning to Manhattan and would not be on the case anymore, that petitioner was being detained in the 42nd Precinct for the purpose of the production of the money. Petitioner further testified that he was told by Detective Corbett that if he didn't go along with Detective Beckles' order, the petitioner would answer to Corbett. Petitioner also testified that he answered Beckles' offer by saying that he would consider the offer if he could have Jones, who he knew was there in the police station, accompany them as a witness because he thought the police might try to steal the money and then say they never recovered it. The supporting testimony comes from the State's own witnesses. Detective Beckles testified at the trial (325-326) that he told the petitioner on his arrival at the 42nd Precinct that, "The reason you are here is that they want the money involved in the bank job," (which supports the petitioner's testimony that he was told by the detectives that he would not leave the 42nd precinct until he produced the money), that "You are here in the Bronx now. You no longer are in my custody... after I leave here I have nothing more to do with you" (incidentally, Detective Beckles continued his association with the case beyond these events and did not return to Manhattan), "The best you can do is get the money and say that it is yours; let them know where it is." Beckles testified, "He then agrees to show me where the money was." The petitioner had steadfastly refused since the previous day to produce the money. Detective Beckles testified



further at the trial (T. 327) that petitioner wouldn't tell where the money was because he didn't trust the police not to steal it. Detective Corbett does not admit at anytime that he told the petitioner that he would answer to Detective Corbett if he didn't go along with Detective Beckles' offer, but what he does say (T. 367) is that he told the petitioner, in an effort to get him to produce the money, that "since he had already lost \$1,700, that there was a good likelihood that he might lose the rest of it if he did not take us to it right away." Clearly, the referred-to testimonies reflect a willingness and was aimed at tricking the petitioner into producing the money against his will to be used in his own prosecution, and indicates that the petitioner must have been led to believe that his ownership of the money would be supported. Detective Corbett testified at the Huntley hearing (HA 75) that upon the return from the money recovery trip, the petitioner said, "It's my money and I want a receipt." Detective Beckles' final testimony on this point was that he told petitioner that he should tell where the money was because it was his money and petitioner could continue to say that it was his money (HB 76). The above undisputed facts confirm the petitioner's contention that he was promised the money would not be used against him.

Thus, the giving up of the money and the confession to the crime occurred after 19 hours of overnight interrogation and shortly after these promises of "help," dropping of the other far less serious charge and safekeeping of the gambling winnings, "underscoring their effect upon his will." Lewis v. Henderson, supra, at 901 (cases cited). Indeed, if petitioner was supposedly acting rationally he would not have been moved by those promises by the police who were obviously, from the



standpoint of objective observers not subjected to the rigors of the hours of coercive pressures, seeking only petitioner's self-damnation. Petitioner, however, his will worn away by fatigue, weakness, and probably in the throes of a mental breakdown, succumbed. Although Detective Corbett also "refreshed his memory" at this time that he had been positively identified as the robber (HB 89) this could not have been a proverbial "straw." \* According to the police, the show-ups had taken place around midnight, 14 hours before he led them to the money, and 16 hours before he confessed. Petitioner testified that he knew at the time the show-ups were being conducted, that he was being identified through a peephole and that the police told him shortly thereafter (HB 18-19,21); the police do not deny that he was told right away that he had been positively identified; Detective Corbett admits that he was only refreshing petitioner's memory just before the confessions, and it is inconceivable that, given all the policemen who participated in petitioner's interrogation throughout the night (none of whom, besides Beckles, has ever been called by the State to testify to what went on during the night as to this and the other aspects of the case) and their admitted zealous quest for the money and a confession in this "very big case" (Hb 97), that petitioner would not have been told as soon as it had happened that he was identified, and therefore, ought to confess. Thus, petitioner had known he had been identified for 14 to 16 hours before he led the police to the money and confessed, and he still maintained his innocence for all those hours  
- - - - -

\* And if it was, it "broke a back" that had already been overloaded by improper and unconstitutionally coercive pressures rendering petitioner incapable of a resistance he would otherwise have had with counsel, rights advice and food and sleep. In other words, this information cannot be isolated from the 19 hours of coercion that preceded it as the reason petitioner confessed "voluntarily."



until the promises were made on top of an already weakened will, affected by no food, sleep or counsel and continuous interrogation.\*

A confession induced by police falsely promising assistance on a charge for less serious than the police knew would actually be brought is not to be considered a voluntary confession.

United States ex rel. Everett v. Murphy, 329 F. 2d (2d Cir., 1964) cert. den. 377 U.S. 967.

Finally, to the extent, if any, that these identifications were used to induce a confession to the crime, the confession was the fruit of procedures "so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377,384 (1968); Gilbert v. California, 388 U.S. 263 (1967); United States ex rel. Stovall v. Denno, 388 U.S. 294 (1967); Wong Sun v. United States, 371 U.S. 471 (1963). Petitioner, obviously in custody, was exhibited to a group of the witnesses, gathered for the event, who viewed him through a peephole either singly or dressed as the robber in a four man line-up, and the witnesses were asked to identify him as the robber (T. 38,47-48, 57, 118-125,144,146,155,157,160-161, 175-178,193-199,200-204,315,317,220,249-250). Regardless of whether or not these show-up procedures tainted the in-court identifications by these witnesses (see infra,) they were certainly violative of due process in themselves. The use of the results of the procedures to convince petitioner to confess would then also be a due process violation. This is the situation warned against in United States v. Edmons, 432 F. 2d 577,585 (2d Cir., 1970) when this Court said, "[The Government] does not 'exploit' a line-up without counsel if it makes no use of what there occurred and satisfies the court that this had no significant effect on

- - - - -

\* Petitioner testified that he recalled the promises to drop the Manhattan charge and the promise to safeguard his gambling winnings although he had no recollection of the promises of help that Detective Corbett testified he definitely made to petitioner just prior to petitioner's confession. (371,381).



the trial testimony." In this case the police did "make use of what there occurred," and therefore they exploited an impermissably suggestive show-up. Wong Sun v. United States, supra.

The factors enumerated by this Court have been established and substantially so by the testimonies of the police officers themselves and the District Court so found. The "conclusion" mandated by this Court is "that Lewis' confession was obtained in circumstances which overcame his will" (520 F. 2d at 902), and his "state court conviction tainted by an involuntary confession cannot stand under the Due Process clause. Jackson v. Denno, 378 U.S. 368, 386 (1964); Payne v. Arkansas, 356 U.S. at 567-68.." 520 2d at 904.

B. Mental Coercion Established; Appellant's Failure to  
Prove the Contrary Beyond a Reasonable Doubt.

While we are arguing that the facts requiring an ultimate finding of mental coercion as a matter of law have been proved beyond a reasonable doubt, or at least by a preponderance of the evidence, a reasonable doubt that the confessions were voluntary requires a finding in petitioner's favor. The State had the burden, which it failed to meet, of proving the confession voluntary beyond a reasonable doubt. The Supreme Court has held in Rogers v. Richmond, 365 U.S. 534, 547-48 (1961), a case like this one where the State courts had applied to a confessions question an incorrect constitutional standard,\*

- - - - -  
\*"This case then falls into the first category of cases in which an evidentiary hearing must be held by the district court under Townsend v. Sain, supra, 372 U.S. at 313-316, and 28 U.S.C. § 2254(d). That is, the merits of the factual dispute surrounding the existence of mental coercion were not resolved in the state hearing. No specific factual findings were made and the federal court cannot reconstruct the state findings, if any, because there is a strong indication that a portion of the applicable constitutional doctrine was misapplied or ignored. Id." United States ex rel. Lewis v. Henderson, supra at 903.



A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment. Where he has not had that opportunity he should not be required to establish in a federal District Court, before a federal district judge who must consider the issue of the voluntariness of the confession in a certain abstraction from the whole, living complex of a criminal trial, and perhaps many years after the occurrence of the events surrounding the confession, facts establishing coercion.

The "appropriate state procedures" in New York with respect to burden of proof on confessions cases is the beyond a reasonable doubt burden of proof of voluntariness resting on the People. People v. Huntley, 15 N.Y. 2d 72 (1965) cf. Lego v. Twomey, 404 U.S. 477 (1972).

At the hearing, appellant incorrectly stated the law when he said, the burden was on the petitioner "to prove by convincing evidence that his contentions are correct" (HB 13). Such a burden falls on a petitioner only when a state factual determination is asserted and is "presumed to be correct." 28 U.S.C. § 2254(d). In this case, there has already been a Second Circuit decision to the effect that the state factual determination was not correct, "that the merits of the factual dispute were not resolved in the State court hearing." 28 U.S.C. § 2254(d)(1); see note, supra, (United States ex rel. Lewis v. Henderson, supra at 903). The "convincing evidence" burden on the petitioner no longer applies, because 28 U.S.C. §2254 (d) states that,

In an evidentiary hearing in the proceeding in the Federal Court... unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7) inclusive, is shown... the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Since this Court has already held that paragraph numbered (1) is "shown" in this case, the burden set out in the statute is inapplicable.



Judge Mansfield in United States ex rel. Castro v. LaVallee, supra at 722-723, tells us what burden and standard of proof applies in its stead, and thus in this case:

Under these conditions, the burden of proof shifts from Castro to the State, United States ex rel. Thurmond v. Mancusi, 275 F. Supp. 508, 520 (E.D.N.Y. 1965 (Weinstein, J.))... The New York State courts as a matter of state procedural law, have adopted the reasonable doubt standard as the applicable test at the preliminary hearing... Fairness and logic dictate that Castro, having been deprived of a hearing consistent with Due Process requirements at trial, should be no worse off at a federal hearing than he would have been had the case been remanded to the state courts for a Huntley hearing. Thus, reason points in the direction of imposing the burden of proof upon the State to show beyond a reasonable doubt that Castro's confession was voluntary.

For all the above reasons and according to the analysis of subpoint A, supra, since the State has failed in its burden to establish the confessions voluntary beyond a reasonable doubt, petitioner has, in effect, proved his allegations of psychological coercion for the purpose of the issuance of the writ.

C. The Physical Coercion Question--New Evidence Requiring Redetermination

This Court, aware that petitioner alleged physical coercion as well as mental coercion, bifurcated the issues, removing the former from the District Court's consideration, remanding the latter and directing that the writ issue if the circumstances of mental coercion were established. Thus, this Court was of the opinion that this bifurcation was no impediment to a finding of coercion. And precedent and the Court below (alip op. at p. im. 3) supports this opinion:

Everett's version was that he was beaten with blackjacks and telephone books, punched in the stomach and kicked and thereafter confessed falsely...



we do not now consider Everett's version since it is contraverted by denials... From the uncontraverted evidence, however, it is established that Everett was arrested illegally, held incommunicado and questioned extensively without counsel or warning of his right to counsel or his right to remain silent and the confession followed upon deception and false promises of assistance...

United States ex rel. Everett v. Murphy, supra at 70.

As in Everett, there are allegations of police brutality; these need not be considered inasmuch as the uncontroverted evidence alone establishes that the confession was involuntary.

United States ex rel. Weinstein v. Fay, 333 F. 2d 815, 817, n. 1 (2d Cir., 1964).

The police denied anything more than the questioning which we have summarized above. We shall make no further mention of this aspect of the case... the undisputed facts show coercion under present standards of due process.

United States ex rel. Williams v. Fay, 323 F. 2d 65, 67 (2d Cir., 1963).

Caminito testified that, before giving the confessions, the police had beaten him. As the police testified to the contrary, we shall ignore that part of his testimony. But, the following facts are undisputed... Accordingly, the writ of habeas corpus must issue.

United States ex rel. Caminito v. Murphy, 222 F. 2d 698 699-701 (2d Cir., 1955).

See also United States ex rel. Vanderhorst v. LaVallee, 285 F. Supp. 233, 239 (S.D.N.Y., 1968).

So, in this case there are the undisputed facts which could comprise a mental coercion handbook (See subpoint A, supra, and Statement of Facts, supra), and the writ should issue, as it did in the above cases where the Courts recognized, as Dr. Lichenstein testified in this case, beatings or no beatings, the totality of other circumstances was sufficient to have coerced a confession and to have induced a psychotic break.



Petitioner submits additionally that the District Court, although perhaps precluded by this Court from an ultimate finding of physical coercion as the proximate cause of the confessions, was not precluded from its own judgment crediting petitioner's testimony. This Court had directed it to hold a hearing and take the evidence, including the testimony of the witnesses. Thus, the Court was empowered to make its own judgment of the credibility of those witnesses. Petitioner's version of the events of those two days in police custody was largely corroborated by the police witnesses themselves. His allegations of brutality by Inspector Walsh and other policeman who interrogated him throughout the night have never been denied by those men; the State has simply never brought forward Inspector Walsh, Detectives Cook, Alfana and Dupont and the others who were with petitioner for most of the night and morning of February 17-18 and at the 42nd Precinct the next day. (HB 92; HA 81,83,67,62; T. 379, 375). The State chose only to produce Beckles and Corbett, who, according to their own testimonies, were the two officers who apparently had the least to do with questioning petitioner at the 30th Precinct (Corbett says he didn't question petitioner at all there). Petitioner never accused Beckles, the black officer who played the "nice guy" role, of physical brutality, and Corbett, although accused, could not offer a denial to cover all the policemen, including Inspector Walsh, who handled petitioner that night in the dorm room at the 30th Precinct. The Supreme Court has held that in such a situation, the undenied allegations will be credited.

Petitioner testified that Dr. Jackson physically abused him while he was in his office and that he was suffering from that abuse when he made the statement, thereby rendering such confession involuntary and the result of coercion. The doctor...



denied that petitioner was actually abused in his presence. He was unable to state, however, that the state patrolmen did not commit the alleged offenses against petitioner's person because he was not in the room during the entire time in which the petitioner and the patrolmen were there... none of the officers present during the incident were produced as witnesses. Petitioner's claim of mistreatment, therefore, went uncontradicted as to the officers... Thus, in remanding the case for a hearing on voluntariness, we indicated to the State that as the evidence then stood it had failed adequately to rebut petitioner's testimony that he had been subjected to physical violence prior to his confession. The State had every opportunity to offer the police officers, whose failure to testify had already been commented on here, to contradict petitioner's version of the events. Its failure to do so when given a second chance lends support to the conclusion that their testimony would not, in fact, have rebutted petitioner's.

Sims v. Georgia, 389 U.S. 404, 406 (1967) (Emphasis added)

See also Haynes v. Washington, *supra*; Jackson v. Denno, 378 U.S. 368, 380, 391, 393-394; United States ex rel. Cannon v. Smith, Docket No. 75-2056 (2d Cir., decided 12/18/75, slip op. 1113, 1119, no. 8; Dyer v. McDougall, 201 F. 2d 265, 269 (2d Cir., 1952); Noce v. Kaufman, 2 N.Y. 2d 347, 352 (1959). And this rule applies, as the above cases hold, especially to a party having the burden of proof.

Also, the credibility of Corbett and Beckles is seriously in doubt, given the many significant contradictions in their version of the events (See Statement of Facts, *supra*). Of major importance on the issue of beatings is Beckles' admission for the first time on the hearing that he saw in the 42nd Precinct, Louis Johnson, who had testified at the Huntley hearing to seeing petitioner hit in the stomach there (HA 49-50). The Huntley judge in his opinion, finding no physical coercion, relied on the testimonies of Beckles and Corbett that they did not recall seeing Johnson at the 42nd Precinct (HA 60, 62 72). Now that Beckles has testified to recalling a friend of petitioner's



named Johnson in the precinct (HB 64-65, 78-80), corroboration of Jones', Johnson's and petitioner's testimony on the beatings is provided and the State factual determination on that issue should not be presumed correct. 28 U.S.C. § 2254(d). In petitioner's reply memorandum in the Court below, he asked that the Court redetermine the issue of physical beatings. The Court felt constrained to regard the issue as "foreclosed" by this Court's remand order, but it agreed that the State trial judge's decision could be questioned in the light of the evidence now before the District Court.

.. since Judge McCaffrey made no findings of fact, it is not perfectly clear whether he found that  
(a) there had been no physical abuse whatever or  
(b) whatever abuse there was, if any, did not cause petitioner to confess. It is at least arguable, then, that it might be open to this court to determine whether there were any beatings and, if so, whether they contributed to petitioner's allegedly coerced confessions.

(alip op. of 7/16/76 at p. i,n.B)

Judge McCaffrey in the State and this Court, when the case was previously before it, did not have the benefit of the detectives' newest testimonies which contradicted their previous testimonies and thus destroyed their credibility.

(a) Their testimony on the Huntley hearing was that the place of the 30th precinct interrogation of the petitioner was a room outside of the policemen's dormitory and that the petitioner was not prevented from sleeping in the dormitory, that petitioner was taken from the dormitory at intervals throughout the night (HA 73a-74, 68) all of which contradicted the petitioner's trial testimony that the interrogation took place in the dormitory. Detective Beckles' habeas testimony was, on the other hand, that the petitioner was in the dormitory when he was being questioned and in the squad office when



he was not being questioned (HB 63-63,74-75).

(b) The detectives' testimony on Huntley was that Louis Johnson was not in either the 30th or 42nd Precincts (HA 60,62,72) and it is clear from his decision that the testimony influenced the Huntley hearing judge in his determination regarding physical coercion. Now it is clear from Detective Beckles' habeas testimony that both Louis Johnson and Joseph Jones (it was Jones who accompanied petitioner and police on the money trip) were in the 42nd precinct at that time (HB 78079) and both Johnson and Jones testified on Huntley <sup>ley</sup> to being in the 30th Precinct (HA 45-56,96-109). Johnson testified on Hunt- that he was under arrest and that petitioner asked to see him (HA 46-47).

Detective Beckles testified on habeas that the police went to Johnson's apartment to make a warrantless search for the money because the police found some addresses of petitioner's friends on petitioner's person (HB 81-82). This dovetails with Johnson's Huntley hearing testimony that he was questioned by law enforcement people at the 42nd Precinct about a black bag (HA 53) and Detective Beckles' habeas testimony (HB 62) that the money they were looking for was contained in a bag. It is submitted that all of this may be considered as new evidence that Johnson and Jones were in the police precincts and thus in a position to see what they claimed they saw and thus corroborate petitioner's claim that physical coercion was used on him and gave truthful testimony on the matter.

(c) Detective Beckles' first time habeas testimony that he questioned the petitioner in the 30th precinct about the robbery and his naming of other interrogators (HB 73,80-81) compares unfavorably with his prior testimony that he did not question the petitioner about the robbery and did not recall who did question petitioner about the robbery in the 30th precinct (T. 337).



(d) Detective Corbett's first time habeas testimony admitting he knew that the petitioner was being questioned all night long about the robbery in the 30th precinct (HB 86,88) indicates he was lying in his two past testimonies when he said at the trial that to his knowledge no interrogation of the petitioner took place at the 30th precinct regarding the robbery (T. 347) and at the Huntley hearing that perhaps questioning of the petitioner did take place in the 30th Precinct but he had no idea of what it was about (HA 73a).

The evidence referred to in the four above paragraphs, it is submitted, decimate any past credibility the State had and reopens any closed questions for a new determination should this Court find mental coercion not dispositive.

#### D. The Harmful Constitutional Error

Appellant asks this Court to now hold the introduction of petitioner's confessions at his State trial harmless error beyond a reasonable doubt, despite this Court's prior holding to the contrary in this very case.

Since a state court conviction, tainted by an involuntary confession, cannot stand under the Due Process clause, Jackson v. Denno, 378 U.S. 368, 376 (1964); Payne v. Arkansas, *supra*, 356 U.S. at 567-68, the decision below is reversed as to the issue of mental and psychological coercion and the case is remanded to the district court for a hearing to resolve the factual disputes surrounding that issue.

Lewis v. Henderson, 529 F. 2d 896,904 (2d Cir., 1975)

The Federal Rules of Appellate Procedure and decisions of this Court and other Circuit Court of Appeals, state unequivocally that prior panel holdings are binding on subsequent panels of the same Court.



F.R. App. P. 35; United States v. Olivares-Vega, 495 F. 2d 827 (2d Cir., 1974) cert. den. 95 S. Ct. 494; Newell v. Shaffer Leasing, 489 F. 2d 103 (5th Cir., 1974); United States v. Jensen, 450 F. 2d 1258 (9th Cir., 1971) cert. den. 405 U.S. 1043. Thus, petitioner submits that this issue is foreclosed to appellant on this appeal. Indeed, appellant waived the issue when it failed to even argue against petitioner's original assertion in his first brief before this Court that his State conviction was unconstitutionally tainted by the introduction of the confessions. \* See the decision below at p.v. n. 17. This Court had the issue before it the first time 'round, and based on petitioner's supported argument of harmfulness, long standing Supreme Court precedent, and appellant's failure to contest it, decided there was a tainted conviction in this case.

It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession... and even though there is ample evidence aside from the confession to support the conviction.

Jackson v. Denno, 378 U.S. 368, 376 (1964).

See also Miranda v. Arizona, 384 U.S. 436, 382 N. 52 (1966); Wong Sun v. United States, 371 U.S. 471, 493 (1963).

The other evidence against petitioner at the trial was the severely attacked identifications of the bank customers and tellers. According to their testimonies, the robbery took a total of 3 minutes. Two weeks thereafter they were in the precinct in a group viewing one man who the police told them was the robber (in a couple of cases, petitioner was exhibited in a 4 man line-up, but as the only man dressed in the same clothes as the robber). Given these highly suggestive

\* It should also be noted that the State never asserted harmless error in the various proceedings in this case in the New York courts.



procedures, the jury may well have had doubts about the accuracy of the identifications, but any such doubts were certainly removed by the corroborating confessions, "all of [which] were involuntary." Decision below, slip op. at p. 26. Although holding that the suggestive pre-trial identification procedures did not in themselves reach the level of a due process taint of the conviction (partly because the witnesses were fully cross-examined and the issue of suggestibility was clearly put to the jury\*) the Court below recognized the relative imperfection of this evidence in considering the calculus of harmless error.

it appears that the out-of-court identifications were indeed improper... the out-of-court deficiencies do diminish to some degree the evidentiary value of the in-court identifications. Id. at p.v.n. 19

Thus, as this Court and the Court below have already held, the recitation to the jury of three separate and detailed confessions (which followed on the heels of each other and were therefore produced by all the found coercive circumstances that preceded them (decision below, slip op. at p. 1,n.2)), had a devastating effect as against the challenge to the accuracy, credibility and due process validity of the eyewitness testimony, the bare numbers of which were neutralized by the group suggestive procedures employed by the police. As the Court below has correctly held (slip op. at pp. 24-25), other evidence in the case either depended on the confessions for a link to the bank robbery (the Waller testimony and the getaway car), or was extracted from petitioner as were the confessions by the unconstitutional mental coercion tactics (the alleged bank money\*\*).

- - - - -  
\* The trial court, of course, refused to charge the jury that it could reject the confessions as involuntary due to psychological coercion (See Point II, infra).

\*\* The only way the money was actually linked to the bank aside from (footnote continued on p. 50).



Appellant provides no legal basis in the cases cited for a retreat in this case from the long standing precedent recognized and adopted here by this Court. The cases cited by appellant apply only where the admission or confession is attacked as per se Miranda violative or Massiah-Sixth Amendment violative (Milton v. Wainwright, 407 U.S. 371 (1972); Hines v. LaVallee, 521 F. 2d 1109 (2d Cir., 1975); Smith v. Estelle, 519 F. 2d 1267 (5th Cir., 1975); Bledsoe v. Nelson, 432 F. 2d 923 (9th Cir., 1970) and/or where there are prior unattacked confessions, (Milton; Moore v. Folette, 425 F. 2d 925 (2d Cir., 1970); United States v. Williams, 524 F. 2d 407 (2d Cir., 1975); United States v. Duvall, 537 F. 2d 15 (2d Cir., 1976); Smith v. Estelle), and/or where the other evidence in the case is unchallenged or the statements are not in themselves incriminatory (Milton; Moore v. Folette; Hines v. LaVallee; United States v. Williams; United States v. Segal, 500 F. 2d 1118 (10th Cir., 1974), Bledsoe v. Nelson) or where the statement was struck from jury consideration (Philips v. Neil, 452 F. 2d 337 (6th Cir., 1971)). None of these "extraordinary" circumstances applies in this case.

## POINT II

PETITIONER WAS DEPRIVED OF DUE PROCESS  
OF LAW, A FAIR TRIAL AND THE PRIVILEGE  
AGAINST SELF-INCRIMINATION WHEN THE  
TRIAL JUDGE REFUSED TO CHARGE THE JURY  
ON THE FACTORS OF MENTAL COERCION WHICH  
WOULD RENDER A CONFESSION INVOLUNTARY

- - - - -

\*(footnote continued from p. 49)-- the confessions was the testimony of a teller identifying numbers he'd written on two \$5 bills found among the cash petitioner gave up to the police. The teller did not know when he had written the numbers on those bills, although he usually did it after 2'o'clock in the afternoons. At the time of the robbery, therefore, there may not have been any bills with such markings in the bank. Often bills with his markings would wind up back in the bank on some uncontrolled future occasion. (See Facts, supra).



The correct constitutional standard for determining the voluntariness of petitioner's confession required a consideration of mental factors. Petitioner was clearly denied the right to have the jury instructed according to this standard. People v. Huntley, supra; Haynes v. Washington, 372 U.S. 503, 316-318, (1963), stands for the proposition that a federal court must grant a new trial if a petitioner has been convicted in a state court on the basis of a jury charge which employed improper constitutional standards of voluntariness. In Haynes, the Supreme Court noted that the trial judge's erroneous instruction concerning the significance of the failure of the police to advise the accused of his rights vitiated the jury's findings of voluntariness and would require a redetermination. The erroneous charge, in pertinent part, was as follows (372 U.S. at 517):

And in this connection, I further instruct you that a confession or admission of a defendant is not rendered involuntary because he is not at the time of making the same reminded that he was under arrest or that he was not obligated to reply, or that the answers would be used against him, or that he was entitled to be represented by counsel.

While this instruction was not per se erroneous because the failure to give warnings is only one of many factors, the Court inferred (373 U.S. at 517, p. 11):

[t]hat the jury was to take this charge as precluding consideration of the cited factors was evidenced by the immediately succeeding instruction which advised that it should consider a denial of communication with friends or an attorney in connection with determining whether the... confession was voluntary or not. (Emphasis in original).

Similarly, the jury was charged at petitioner's trial (T. 658):

Under our law there is no obligation upon a district attorney or police officer to first warn a defendant or suspect of his constitutional and



statutory rights such as the right against self-incrimination and right to counsel, in order to obtain a valid confession.

In concluding, Judge McCaffrey stressed the physical aspect of voluntariness and effectively precluded consideration of the mental factors (T. 667):

The court will charge that in deciding whether the defendant was coerced into confessing, the jury may take into consideration the length of time in which he was held by the police prior to arraignment and any physical pressure applied to him. You have an exception as to my omitting the mental or psychological.

The charge given at petitioner's trial was even more defective than the erroneous Haynes charge and a similar inference must be drawn. In petitioner's case, all facts of mental coercion, except the delay in arraignment, were rejected, while in Haynes only the single factor of the failure to advise the accused of his rights was excluded. There can be no doubt that the charge in petitioner's case prevented the jury from making a proper determination of voluntariness.

In Negron v. Henderson, 496 F. 2d 858 (2d Cir., 1974) the jury was instructed by the state court that the failure of the police to advise the petitioner of his constitutional rights prior to questioning had no bearing whatsoever on the voluntariness of his confession. The respondent conceded that this instruction was erroneous but contended, inter alia, that any error in the jury instruction was a matter of state law only. The court implicitly rejected this contention in deciding the case on other grounds. Haynes and Negron clearly indicate that the jury instruction is not insulated from federal due process considerations, especially, as here, where the erroneous jury instruction does bear closely upon petitioner's allegations of psychological coercion." Negron, supra at 860.

This point was included in the original petition and it was briefed in this Court on the first appeal at pp. 28-29 of petitioner's



brief. This Court felt it unnecessary to reach the issue at that time given its remand for District Court consideration of the mental coercion question, Lewis v. Henderson, 520 F. 2d 896, 903 n. 6, however the issue was clearly raised on the first appeal; it is there in black and white in petitioner's brief on the first appeal. Thus, this Court was in error when it stated that the issue was not raised. Ibid. The issue was raised again before the District Court, and that court was also referred to the petitioner's first brief at the specific pages wherein the jury instruction point was clearly raised, Nonetheless, the District Court, because of this Court's misstatement and because it also found it unnecessary to reach the point, did not pass on it. Petitioner submits that he has never waived this point, that he has shown that the State court determination of this federal question of Constitutional law was clearly erroneous, and that should this Court disagree with the Court below on the grounds upon which it granted the writ, it must still affirm the decision on the ground set forth in this point.\*

### POINT III

THE POLICE UNNECESSARILY AND IMPERMISSABLY SUGGESTED THAT PETITIONER WAS THE BANK ROBBER BY SHOWING HIM UP ALONE AND IN CUSTODY AND DRESSED AS THE ROBBER TO A GROUP OF WITNESSES WHO WERE TOLD THEY WERE THERE TO IDENTIFY THE ROBBER AND WHO DISCUSSED THEIR IDENTIFICATIONS WITH EACH OTHER, AND SINCE THEY HAD ONLY FLEETING OPPORTUNITIES TO SEE THE ROBBER'S FACE DURING THE CRIME, THEIR IN-COURT IDENTIFICATIONS WERE IRREVOCABLY TAINTED.

Every highly suggestive device was employed in this case to tell the group of witnesses en masse, "This is the man." Foster v.

-----  
\* "The appellee may, without having to file a cross appeal, defend a judgment on any ground consistent with the record, even if rejected in the lower court." Committee on Federal Courts, Appeals to the Second Circuit (1975), p. 27. Petitioner attempted to file a notice of (footnote continued p. 54).



California, 394 U.S. 440, 443 (1969) (See Statement of Facts, supra). Even where a witness has had a good view of the perpetrator for a few minutes, a photo or I.D. show-up, being unnecessary and dangerously conducive to suggested, mistaken identification, will preclude an in-court identification by the witness. Braithwaite v. Manson, 18 Cr. L. 2290 (2d Cir., decided November 20, 1975); United States ex rel. Cannon v. Smith, (2d Cir., Docket No. 75-2056, decided December 18, 1975) slip op. 1113. Here, the witnesses, having had only fleeting glances in a highly emotional situation and while performing various tasks at the robber's command or being held in a position making view of the face difficult, were subjected in a group to the worst possible (from the standpoint of due process) identification procedures, and a new trial should be ordered and the identifications suppressed.

Much testimony was elicited at the trial indicating that the witnesses were actually looking at the robber during the commotion of the robbery for only the most exceedingly brief and fleeting instants of time, interspersed through the tense and confused few minutes of the episode. For example, Mr. Viselteur testified under cross examination that the various instants during which he saw the robber's face added up to 65 or 70 seconds and that in the meantime he was busy carrying out the robber's commands (T.M. 43-45). Mrs. Kleber testified to a look of "a couple of seconds" at the robber (TM. 149) and later to "a glance" (TM. 151) and then to a look of "three or four seconds" (TM 153). Likewise, Mrs. Backenheimer had a look of perhaps 10 seconds before she was busied putting money into one of the robber's shopping bags (172), and later two more brief looks (173-174). Mr. Schneider

- - - - -  
\* (Footnote continued from p. 53)-- cross appeal in any case, but the District Court endorsed a pro se clerk's forwarding memo to the effect that, "Petitioner having prevailed, no cross appeal is necessary or proper. His counsel may invoke any grounds in his favor." The notice of cross appeal and the endorsed memo are part of the record on appeal having been docketed in the District Court.



testified to viewing the robber four successive times for a few seconds each time (248,264). The testimony of other witnesses was in similar vein.

It developed that the witnesses prior to the trial had been shown the defendant in the police station on one or more occasions and asked if they could identify him as the robber. The record shows that these show-ups occurred on February 17th or 18th, 1958. One witness, Mr. Viselteur, testified that defendant was exhibited to him via a peephole through which the defendant, a negro, was to be seen standing in the witness' direct line of vision, with detectives and other police personnel, mostly or entirely white, walking around and talking in the periphery of the peephole view (48-52). Another witness, 13 year old Frances Kleber, testified defendant was the only negro visible in a similar peephole identification (121). Another witness, Mrs. Kleber, also testified to a peephole identification, said that defendant was exhibited to her standing in a room talking to a seated man apparently a police officer with no one else present (156). Mrs. Backenheimer, another witness, refers to a peephole identification (175-176). She testified that through the peephole she saw the defendant flanked by two other men whom she could give no information on. But it is clear from the total record that this was the same show-up as with the other witnesses. She says (177), "We were directed" to look through the peephole. The defendant was flanked and had his movements controlled by two white policemen. Another witness, Mr. Gruttner, testifying to a peephole identification of the defendant, said that while there were other people moving around the room, defendant was the only person standing still and that he was the one the witness had been directed to observe (195).



The other two witnesses testified to four man line-up identifications. Mr. Calabrese testified (215-218) that defendant probably was the only man in the line-up wearing clothing corresponding to the witness' earlier description of the clothing the robber wore. He was not permitted by the court, after an objection by the prosecutor to the question, to answer counsel's question whether the clothing influenced his identification (218). His testimony throws no light on whether any of the others in the line-up approximated the size and color of the defendant. Mr. Schneider testified that when he viewed the defendant in a four man line-up, defendant was wearing a dark blue overcoat that he thought was the same one that the robber wore but had no hat on (249); but his testimony that defendant was hatless in the lineup is subsequently contradicted by him (252). He added that one other had the same color overcoat and that all in the line-up were light skinned negroes like the defendant (249-250). His testimony throws no light on the question of their size in relation to the defendant's. The petitioner recalls that the line-up was made up of the defendant and three policemen who were much taller than defendant, and that one of these two witnesses had prior to the lineup viewed defendant single in a squad room surrounded by policemen. The lineup or lin-ups contained no one approximating the size and color of the defendant.

All of the eyewitnesses to the robbery that testified for identification purposes stated that the robber wore either a dark blue overcoat and grey hat (Frances Kleber [104], Mrs. Kleber [148], Calabrese [214], Schneider [247]) or a dark overcoat and dark or grey hat (Viselteur [35], Bachenheimer [172] (dark overcoat and a hat), Gruttner [191-193]).



When the defendant was arrested he was wearing different clothing than that he was forced to wear during every confrontation for purposes of identification which was clothing corresponding to the witnesses' earlier description of the robber. This contention is to some extent proved by the record as follows: Mr. Viselteur's testimony (51) that his identification was instantly positive is undermined by his further testimony (51-52) that he took a few additional looks after his first look through the peephole and walked away and returned for another look, and by his further testimony (59) that he told one of the policemen that the robber had a hat on and then put a hat on the defendant. This shows that the presentation of the defendant alone dressed like the robber probably affected and caused Mr. Viselteur's identification. Frances Kleber testified (121) that she identified defendant because a district attorney present at the show-ups told her that the defendant had a space between his teeth and (131) because of the glasses, hat and coat he was wearing. Mrs. Kleber's testimony (156) that she was sure in her own mind that defendant was the robber after viewing him through the peephole for the first time is undermined by her further testimony (158-59) that she informed the detective that the defendant was not wearing the hat that the robber wore although he was wearing the same coat, and that she then looked at him again through the peephole with both the hat and coat on and he was dressed exactly the same as the bank robber as she requested (159). Here again the defendant's dress and presentation obviously were vital factors in the identification. Mr. Gruttner testified (195) that during the time he observed defendant through the peephole for identification, defendant put on a blue coat to go with the grey hat he was already wearing. Clearly he must have been unable to identify absent the



clothing that defendant was forced to don. Mr. Calabrese testified (215-218) that defendant probably was the only man in the four man line-up wearing clothing corresponding to the witness' earlier description of the clothing the robber wore and he was not permitted by the court, after an objection by the prosecutor to the question, to answer counsel's question as to whether the clothing influenced his identification (218).

It is clear that the confrontations here violated due process. Stovall v. Denno, *supra*, 299,302.

The record shows there were many eyewitnesses to the robbery that the People did not call and gave no explanation for not calling. Mr. Viseltear, the bank's manager, says (26) that the bank's assistant manager, Sherwin, was present; that Mrs. Macora, another teller, was there as were Mr. Viseltear's stenographers. He states that there were also some customers present and that he only knew one (Mrs. Bachenheimer who was a People's witness (27)). A garage man came in that he recognized (55). A utility clerk for the bank was present (97). It was only the improper confrontations that enabled the People to accumulate what witnesses they did have to testify against the defendant.

The total record on the identification issue, which involves (1) one to one pre-trial confrontations for identification purposes with the petitioner forced to don clothing corresponding to the descriptions of the perpetrator given by the witnesses to the crime, together with (2) the fact that the state court erroneously (O'Connor v. Ohio, 385 U.S. 92; Stovall v. Denno, 388 U.S. 293,299) relied in part for its determination on the ground that there was no allegation of any motion made at the trial to strike the in-court identification on the ground that it was based on the illicit line-up identification and (3) the fact that the Court relied in part for its conclusion that the confrontations did not



result in a due process violation on the completely unrelated principle that justifies a confrontation without a line-up in a case where it is not known if the witness will live or die, shows the determination of the state to be unreliable. Townsend v. Sain, 372 U.S. 293, 312-315)

Stovall v. Denno, *supra* (388 U.S. 293) stated that the identification must be so impermissably or unnecessarily suggestive as to give rise to a substantial likelihood of misidentification." Petitioner submits here that there cannot actually be confrontations more unnecessarily or impermissably suggestive than those in the present case where the petitioner was shown alone to the witnesses and made to don clothing fitting their descriptions of the clothing worn by the perpetrator. The Appellant points out that the witness (Visetear) did not identify in court the man sitting next to the petitioner, that the witness testified that he looked at the petitioner's face and not at his clothes at the stationhouse, and that he described the "robber's" face without looking at him and recognized him in the courtroom immediately. Why should the witness identify the man sitting next to the petitioner? He was not singly displayed to the witnesses in the police station dressed like the robber, nor was he dressed like the robber in the courtroom. Everybody, even the appellant, must know in these enlightened times that in addition to the conscious mind there is a subconscious mind and an unconscious mind. How can the appellant or the state court Judge take such a statement by the witness, that he looked at the petitioner's face and not his clothes at the stationhouse confrontation, as dispositive of what affected his identification. The witness, Viseltear, looked at the petitioner at the show-up in the police station through the peephole several different times in the process of making his identification. And of course he could describe



the petitioner without looking at him after viewing him not in the tense and confused few minutes of the robbery but in the relaxed and unhurried atmosphere of direct lighting and forced poses of the police station confrontations. With regard to appellant's reference to Mr. Visel tear; s statement of satisfactory lighting in the bank for identification, when the stationhouse confrontations imposed on the witness' mind the image of the petitioner as the robber, bank lighting had to become in his mind adequate for that purpose. There was no objective testimony regarding candlepower intensity of the light in the bank at that time.

Some of the same things apply to the witness Frances Kleber. She saw the petitioner dressed like the robber and identified the petitioner only after she was told by a detective that he had a triangle shaped space between his teeth (actually the petitioner has always had a straight and not triangular shaped space between his teeth). She said she identified the petitioner because of what he was wearing at the show-up in combination with the fact that he was wearing sunglasses and was told he had a triangular space between his teeth.

The same applies to the witness, Alice Kleber. Appellant argues about this witness that she had been asked to identify others in connection with the robbery but did not do so. Had these others been presented to her singly, dressed like her description of the robber's clothing? Appellant does not and cannot give such an answer. The witness' failure to identify others becomes meaningless.

Mr. Gruttner observed the petitioner through the peephole and the defendant was made in front of the witness to put on a blue coat to go



with the grey hat he was previously forced to put on, it's not surprising that the witness would not forget that face from that point on because it's not likely that he remembered it when he first viewed the petitioner through the peephole or the clothing change would not have been necessary.

Appellant in his identification memo in the Court below, referred to a number of second circuit decisions to bolster his position that there was no denial of due process in this case. Those cases do not appear applicable to deny relief here. A discussion of some of those cases follows.

The case of U.S. ex rel. Phipps v. Follette, 428 F. 2d 912, involves the identification by a witness to a gas station robbery whose identification is supported by much properly admitted corroborating evidence including but not limited to the fact that his accomplice testified against the defendant, the accomplice was heard to call out the defendant's name at the scene and the suspects were stopped in the automobile described by the witness.

In U.S. v. Mims, 481 F. 2d 636, Mims was seen by bank robbery witnesses at the preliminary hearing some two weeks later and identified, but the witness testified that he had seen Mims the previous day and recognized him sitting unhandcuffed in the first row of the spectator's section of the courtroom not even realizing Mims was under guard, that he had viewed Mims at the crime scene for up to a full minute. Additionally, there were other considerations supporting the conclusion of no taint in the Mims case such as corroborative evidence and testimony of Mims's accomplice implicating him. Mims, supra at 637, footnote 5.

In U.S. v. Yanishefsky, 500 F. 2d 1327, the defendant's picture was selected by the corrections officer witness from a photographic display



of six, which display the Court doubted was suggestive. The case is different from the one at bar which was clearly suggestive to the extent that petitioner here was shown alone to most of the witnesses and made to don the kind of clothing worn by the robber (this latter feature does not exist in any of the cases cited by the appellant in his identification memo). Also in Yanishefsky, the events took place subsequent to the point in time when courts were alerted to watch for the dangers of misidentification resulting from improper identification procedure. (Yanishefsky, supra at 1331). The events in the case at bar took place prior to that time. Indeed, in the present case, in the suggestive line-up situation when the witness (Calabrese) was asked by the defense if the fact that the petitioner was the only man in the four man line-up dressed like the robber, influenced his identification, the court sustained a groundless objection to the question (T. 215-218).

In U.S. ex rel. Cummins v. Zelker, 455 F. 2d 714, the witness identified petitioner at a suggestive show-up on the same day as the crime when her memory was still fresh (717), and the show-up followed an accepted as legal on the scene confrontation at which the witness came effectively close to identifying the suspects. The identification was supported by a confession, a tan sweater and other things, and all of these things brought the court to the conclusion that the pre-trial confrontation was not the basis of the in-court identifications.

In U.S. ex rel Gonzales v. Zelker, 477 F. 2d 797, at 803, the court notes that while the procedure there was suggestive, there was no indication that the police were guilty of any activity designed to unfairly influence the trial of the relator such as an attempt to persuade or coerce the witnesses to identify. The contrary is true



in the present case. The police persuaded the identification in the case at bar by forcing the petitioner to dress like the robber for the confrontations for identification purposes. Of the record in the present case it can only be said that the witnesses on the trial were actually identifying the petitioner not as the man they saw rob the bank in disconnected glances during the tense and confused few minutes of the episode, but as the man they saw under very different conditions who was made to dress exactly like the robber and at whom they could look at relaxed leisure. (Gonzales, supra, 801) Additionally, in Gonzales, there were other factors that the court considered in determining whether the suggestive identification procedure resulted in misidentification such as other incriminating evidence in the case not associated with the identification process (Gonzales, supra at 803-804).

United States ex rel. Pella v. Reid, \_\_\_ F. 2d \_\_\_ (2d Cir., Dec. 11, 1975, slip op. 1025) points out at pages 1033-34 that due process is violated when pre-trial confrontations are so arranged as to make the resulting identifications virtually inevitable. The confrontations here represent the furthest and grossest extreme that identification confrontations can be taken to.

However, if the language used by the Supreme Court in the case of Neil v. Biggers, 409 U.S. 188, can be applied to the present case in which the identification procedure is far more notorious, the identifications here, in order to be sanctioned, must be shown to retain string indicia of reliability and there has been no such showing.

Thus, should this Court disagree with the grounds relied upon by the Court below in its order granting the writ, this Court should nonetheless affirm the order on this alternate ground (see footnote in Point II, supra).



CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDER AND  
JUDGMENT BELOW SHOULD BE AFFIRMED AND THE  
WRIT SHOULD ISSUE VACATING THE JUDGMENT OF  
CONVICTION AND ORDERING PETITIONER'S IMMEDIATE  
RELEASE.

Respectfully submitted,

LAWRENCE STERN  
Attorney for Petitioner/Appellee

11 Monroe Place  
Brooklyn, N.Y. 11201  
(212) 875-4304



STATE OF NEW YORK, COUNTY OF

ss.:

is over 18 years of age and resides at

being duly sworn, deposes and says: deponent is not a party to the action,

☒ Affidavit  
of Service  
By Mail

On

upon

attorney(s) for

1976

deponent served the within

in this action, at

the address designated by said attorney(s) for that purpose

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Check Applicable Box

☐ Affidavit  
of Personal  
Service

On

19

at

deponent served the within

upon

herein, by delivering a true copy thereof to person so served to be the person mentioned and described in said papers as the

the personally. Deponent knew the therein.

Sworn to before me on

1976

ALBERT H. SOCOLOV  
Notary Public, State of New York  
No. 24-800873  
Qualified in Kings County  
Commission Expires March 30, 1978

The name signed must be printed beneath

Laurence Stern